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SENATE

REPORT
101-263

THE OLDER WORKERS BENEFIT PROTECTION ACT

APRIL 5 (legislative day, JANUARY 23), 1990.—Ordered to be printed

Mr. KENNEDY, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 1511]

The Committee on Labor and Human Resources, to which was referred the bill (S. 1511) to amend the Age Discrimination in Employment Act of 1967 to clarify the protections given to older individuals in regard to employee benefit plans, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

S543-2

SECTION 1. SHORT TITLE.

This Act may be cited as the "Older Workers Benefit Protection Act".

TITLE I—OLDER WORKERS BENEFIT PROTECTION

SEC. 101 FINDING.

The Congress finds that, as a result of the decision of the Supreme Court in Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 256 (1989), legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations.

SEC. 102. DEFINITION.

Section 11 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 630) is amended by adding at the end the following new subsection:

"(1) The term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.".

SEC. 103. LAWFUL EMPLOYMENT PRACTICES.

Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended—

(1) by striking subsection (f) and inserting the following new subsection:

"(f) It shall not be unlawful for an employer, employment agency, or labor organization to take any action otherwise prohibited under subsections (a), (b), (c), or (e)—

"(1) where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

"(2)(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) because of the age of such individual; or

"(B) to observe the terms of a bona fide employee benefit plan where, for each benefit or benefit package (as permissible under section 1625.10, title 29, Code of Federal Regulations, as in effect on June 22, 1989), the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, except that—

"(i) it shall not be unlawful to observe the terms of a bona fide voluntary early retirement incentive plan that furthers the purposes of this Act; and

"(ii) no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a), because of the age of such individual; and

"(3) to discharge or otherwise discipline an individual for good cause.

An employer, employment agency, or labor organization acting under paragraphs (1) or (2) shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act.";

(2) by redesignating the second subsection (i) as subsection (j); and

(3) by adding at the end the following new subsections:

"(k) A seniority system or employee benefit plan shall comply with this Act regardless of the date of adoption of such system or plan.

"(l)(1) In the case of a defined benefit plan (as defined in section 3(35) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(35)), it shall not be a violation of subsection (a), (b), (c), or (e) solely because the plan provides, on a permanent basis, for—

"(A) the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits;

"(B) payments that constitute the subsidized portion of an early retirement benefit; or

"(C) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II

of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

"(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) solely because following a contingent event unrelated to age—

"(i) the value of any retiree health benefits received by an employee eligible for an immediate pension; and

"(ii) in any case in which retiree health benefits as described in clause (i) are provided in clause (i) are provided, the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and that make the individual eligible for not less than an immediate and unreduced pension,

are deducted from severance pay made available as a result of the contingent event unrelated to age.

"(B) For an employee who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

"(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits as described in section 501(c)(17) of the Internal Revenue Code of 1986) that—

"(i) constitutes additional benefits of up to 52 weeks;

"(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

"(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

"(D) For purposes of this paragraph, the term 'retiree health benefits' means benefits provided pursuant to a group health plan covering retirees, for which—

"(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.); and

"(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act.

"(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

"(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

"(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on the date of enactment of this subsection, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after the date of enactment of this subsection, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

"(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

"(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.".

SEC. 104. EFFECTIVE DATE.

(a) IN GENERAL.—This title and the amendments made by this title shall become effective on the date of enactment of this Act.

(b) APPLICABILITY.—Except as provided in subsection (c), this title and the amendments made by this title shall apply to—

(1) all actions or proceedings brought under the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.) after June 23, 1989; and

(2) all actions or proceedings brought under such Act prior to June 23, 1989, that were pending on June 23, 1989.

(c) COLLECTIVELY BARGAINED AGREEMENTS. With respect to any action or proceeding brought after June 23, 1989, pertaining to a collective bargaining agreement—

(1) that is in effect as of the date of enactment of this Act;

(2) that terminates after such date of enactment;

(3) any provision of which was entered into by a labor organization (as defined by section 6(d)(4) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)(4)); and

(4) that contains any provision that would be superseded by this title and the amendments made by this title, but for the operation of this section,

this title and the amendments made by this title shall not apply until the termination of such collective bargaining agreement or June 1, 1992, whichever occurs first.

TITLE II—WAIVER OF RIGHTS OR CLAIMS

SEC. 201. WAIVER OF RIGHTS OR CLAIMS.

Section 7 of the Age Discrimination and Employment Act of 1967 (29 U.S.C. 626) is amended by adding at the end the following new subsection:

"(f)(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

"(A) the waiver is part of a written agreement between the individual and the employer;

"(B) the waiver specifically refers to rights or claims arising under this Act;

"(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

"(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

"(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

"(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

"(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

"(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

"(H) if a waiver is requested in connection with an exit incentive or other employment termintion program offered to a group or class of employees, the employer informs the individual in writing, at the commencement of the period specified in subparagraph (F), as to—

"(i) any class, unit, or group of employees covered by such program, any eligibility factors for such program, and any time limits applicable to such program;

"(ii) any demotion, termination, or other adverse action that the employer either knows or should know may occur if the individual declines to participate in such program, and the approximate date when such adverse action reasonably may be anticipated to take effect;

"(iii) the job titles and ages of all individual eligible or selected for the program; and

"(iv) the job titles and ages of all individuals in the same plant, facility, or organizational unit who are not eligible or selected for the program; and

"(I) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer agrees to reimburse the employee for 80 percent of the fees and costs for services provided by the employee's attorney in connection with the waiver requested up to an amount equivalent to a maximum for any individual employee of 10 hours at the attorney's usual hourly rate, and the employer so informs the individual as part of the advice required under subparagraph (E).

"(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age descrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum—

"(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

"(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

"(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in paragraph (1) or (2) have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

"(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to jusitify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.".

SEC. 202. EFFECTIVE DATE.

(a) IN GENERAL.—Except as otherwise provided in this section, the amendment made by section 201 shall become effective on the date of enactment of this Act.

(b) CONSIDERATION AND REVOCATION OF AGREEMENTS, EMPLOYMENT TERMINATION PROGRAMS.—Subparagraphs (F) through (I) of section 7(f)(1), and all of section 7(f)(2), of the Age Discrimination and Employment Act of 1967 (as added by section 201 of this Act) shall apply only to waivers first offered or executed more than 60 days after the date of enactment of this Act.

(c) RULE ON WAIVERS.—Effective on the date of enactment of this Act, the rule on waivers issued by the Equal Employment Opportunity commission and contained in section 1627.16(c) of title 29, Code of Federal Regulations, shall have no force and effect.

TITLE III—SEVERABILITY

SEC. 301. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected thereby.

I. SUMMARY

S. 1511, The Older Workers Benefit Protection Act, amends the Age Discrimination in Employment Act of 1967 (ADEA) in two important respects. The bill makes clear that discrimination on the basis of age in virtually all forms of employee benefits is unlawful. In addition, the bill ensures that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA.

Title I: The legislation clarifies and restores one of the original purposes of the ADEA—the eradication of age discrimination in employee benefits. The bill overturns both the reasoning and holding of the Supreme Court in *Public Employees Retirement System of Ohio* v. *Betts*, 109 S. Ct. 2854 (1989). In *Betts*, the Supreme Court incorrectly held that the ADEA permitted arbitrary age discrimination in employee benefit plans. The bill is necessary to correct that erroneous holding.

First, the bill specifies that the ADEA's prohibition against age discrimination in "compensation, terms, conditions, or privileges of employment" covers virtually all employee benefits and employee benefit plans.

Second, the bill clarifies the ADEA's affirmative defense for employee benefit plans. Employers invoking this defense are required to provide equal benefits to, or to incur equal cost for benefits on behalf of, all employees. The bill tracks the requirements set forth in ADEA regulations for over twenty years, requirements that had been approved by every federal court of appeals to consider the defense in the 12 years preceding the decision in *Betts*. The bill then

sets forth several carefully considered and carefully drawn exceptions to this "equal benefit or equal cost" requirement. The exceptions pertain to certain benefits provided by a defined benefit pension plan, and also to severance pay made available as a result of a contingent event unrelated to age.

Third, in amending the affirmative defense for employee benefit plans, the bill reestablishes that employers bear the burden of proving this defense.

Fourth, the bill rejects any distinction between discriminatory provisions that pre-date the ADEA and those that were enacted after the passage of the Act. This clarifies that all forms of age discrimination in employee benefits are forbidden by the Act, regardless of their date of origin.

Title II: The bill also amends the ADEA to set forth the threshold requirements for judicial consideration of a waiver of rights under the Act. Courts may not consider whether a "knowing and voluntary" waiver has been executed until the party asserting the waiver as a defense first proves that each of the requirements set forth in the bill has been satisfied. These requirements include: (1) the waiver is part of a written agreement; (2) the agreement makes specific reference to rights and claims under the ADEA; (3) The waiver does not apply to rights or claims that may arise after the date of the agreement itself; (4) the waiver is exchanged for valuable consideration in addition to what the individual already is entitled to receive; (5) the individual is given a reasonable time period in which to review and consider the agreement; and (6) the individual is advised in writing to consult with an attorney.

If waivers are requested in connection with exit incentive or group termination programs, the bill establishes two additional requirements. Employers must furnish specific information describing the eligibility factors for inclusion in the program; the age profiles of individuals who are included in and excluded from the program; and any adverse consequences that individuals are likely to experience if they choose not to participate in the program. Employers also must meet specified financial obligations for preliminary legal advice sought by eligible employees.

II. Background and Need for Legislation

A. The 1967 legislative history to the ADEA

With the passage of the ADEA, Congress "broadly prohibit[ed] arbitrary discrimination in the workplace based on age." *Trans World Airlines, Inc.* v. *Thurston,* 469 U.S. 111, 120 (1985), *quoting Lorillard* v. *Pons,* 434 U.S. 575, 577 (1978).

The 1967 legislative history of the ADEA reveals that the specific and very limited purpose of the exception for employee benefit plans set forth at Section 4(f)(2) was to ensure that employers were not discouraged from older workers due to excessive benefits costs.

The ADEA bill proposed by the Johnson Administration in 1967, S. 830, contained no separate provisions for the observance of bona fide employee benefit plans. Recognizing that the cost of certain employee benefits increases with age, Senator Jacob Javits, Republican (minority) manager of the ADEA, declared that:

> The administration bill . . . does not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for excuses not to hire older workers when they might have hired them under a law granting them a degree of flexibility with respect to such matters.

Age Discrimination in Employment Act: Hearings on S. 830 and S. 788 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 27 (1967). Consequently, Senator Javits introduced the amendment that became section 4(f)(2), because:

> . . . in its absence employers might actually have been discouraged from hiring older workers *because of the increased costs involved in providing certain types of benefits to them.*

S. Rep. No. 723, 90th Cong., 1st Sess. 14 (1967). (Individual Views of Mr. Javits) (emphasis added).

The floor debates confirmed this understanding. During the 1967 Senate debate, Senator Javits explained that the exception for bona fide employee benefit plans that are not "a subterfuge to evade the purposes of" the ADEA would justify lesser benefits for older employees only when those benefits were more costly to provide. He stated:

> [Under secction 4(f)(2)], an employer will not be compelled to afford older workers exactly the same pension, lretirement or insurance benefits as younger workers and thus employers will not, *because of the often extremely high cost of providing certain types of benefits to older workers,* actually be discouraged from hiring older workers.

113 Cong. Rec. 31254–55 (November 6, 1967) (emphasis added). Responding to Senator Javits, Senator Yarborough, majority manager of the ADEA, agreed with this statement and added:

> This [4(f)(2)] will not deny an individual employment or prospective employment but will limit his right to obtain full *consideration* in the pension, retirement, or insurance plan.

113 Cong. Rec. 31255; *see also* remarks of Rep. Daniels, 113 Cong. Rec. 34746 (December 4, 1967) (section 4(f)(2) "is designed to maximize employment possibilities without working an undue hardship on employers in providing special and costly benefits").

Thus, the intent of Congress in enacting section 4(f)(2) was to ensure that employers need not provide "exactly the same benefits" when to do so would result in the type of undue expense that could discourage the hiring of older workers. In order to achieve this objective, section 4(f)(2) relieved employers of the duty to provide older workers with equal benefits *if providing equal benefits to older workers would be more costly for the employer.*

B. Contemporaneous executive branch interpretation

Shortly after passage of the Act, the Department of Labor, which then had responsibility for enforcement of the ADEA, interpreted section 4(f)(2) as implementing a congressional intent that age-based differences in employee benefits be permitted where justified by age-related cost increases for benefits. This 1969 interpretation articulated what became known as the "equal benefit or equal cost" principle:

> Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purposes of the Act. A *retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.*

29 C.F.R. Section 860.120(a) (1970) (emphasis added). Under the Department of Labor regulation, an employer could demonstrate that an age discriminatory employee benefit was not a "subterfuge" to evade the purposes of the Act by proving that it incurred equal cost for the challenged benefit. No rationale other than the increased cost of the benefit was discussed in this regulation.

The regulation effectively harmonized two critical purposes behind the enactment of the ADEA. On the one hand, it protected older workers by eliminating arbitrary age discrimination in employee benefits. On the other hand, it facilitated the hiring of older workers by ensuring that they were not more expensive to employ.

C. 1978 amendments to ADEA

In passing the 1978 amendments to the ADEA, Congress dispelled any doubts that had arisen regarding the meaning of section 4(f)(2) of the Act. One original purpose of the 1978 amendments was to resolve a conflict among the federal courts of appeals regarding involuntary retirement pursuant to an employee benefit plan that pre-dated the ADEA under section 4(f)(2). In *Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974), the Fifth Circuit had held that mandatory retirement pursuant to an employee benefit plan that pre-dated the ADEA was lawful. But the Fourth Circuit held that under section 4(f)(2), a forced, age-based retirement pursuant to a pre-ADEA plan would be considered a "subterfuge" to evade the ADEA absent an employer's showing of a legitimate business purpose for such an action. *McMann* v. *United Air Lines, Inc.* 542 F.2d 217 (4th Cir. 1976).

In 1977, Congress initiated steps to resolve this conflict in favor of the Fourth Circuit's decision in *McMann*. Thus, the 1977 Senate Report accompanying the bill to amend section 4(f)(2) noted the conflict in the courts of appeals and announced its "approval of the result reached by the Fourth Circuit in *McMann*." S. Rep. No. 493, 95th Cong., 1st Sess. 10 (1977). The Report also expressed the Senate Committee's disagreement with the contrary holding by the Fifth Circuit in *Brennan* v. *Taft Broadcasting* in the following language.

> [The Fifth Circuit] concluded, erroneously in the committee's view, that a plan could not be a subterfuge within the meaning of section 4(f)(2) if it was operative before the effective date of the Act.

Id.

After the issuance of the Senate Report but before final congressional action, the Supreme Court reversed the decision of the Fourth Circuit by holding that a plan that predated the ADEA could not constitute a "subterfuge" to evade the statute or its purposes. *United Air Lines, Inc.* v. *McMann,* 434 U.S. 192 (1977).

Within a few months of its issuance, the Supreme Court's decision in *McMann* was overruled by congressional passage of the 1978 amendments to the ADEA. Congress took care to express disapproval of both the *result* and the *reasoning* in the *McMann* opinion. To that end, the Conference Report on the 1978 amendments made unmistakably clear that the "subterfuge" clause was never intended to provide a blanket exception for all pre-Act employee benefit plans. As the report explains:

> The conferees specifically disagree with the Supreme Court's holding and reasoning in [*McMann*]. Plan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact they antedate the act or these amendments.

H.R. Conf. Rep. No. 950, 95th Cong. 2d Sess. 8 (1978). *See also* remarks of Sen. Javits, 124 Cong. Rec. 8218 (March 23, 1978) ("As stated in the conference report, the 'conferees specifically disagree with the Supreme Court's holding and reasoning in that [*McMann*] case' "); remarks of Rep. Hawkins, 124 Cong. Rec. 7881 (March 21, 1978).

Congress also reaffirmed unequivocally that the employer's burden of proving "equal benefit or equal cost" under section 4(f)(2) was consistent with congressional intent when enacting section 4(f)(2) in 1967. The "equal benefit or equal cost" principle under section 4(f)(2) was repeatedly, and specifically, recited by managers of the amendments and other members of Congress as an employer's exclusive means of proving compliance with the ADEA. Senator Javits, while addressing the proposed amendment of section 4(f)(2), repeated the existing "equal benefit or equal cost" interpretation almost verbatim:

> The purpose of Section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers.

> Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. Thus a retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage. This is consistent with [the] statement I made during the November 6, 1967 floor consideration of the original act.

124 Cong. Rec. 8218–19 (March 23, 1978). Senator Williams, the majority manager of the 1978 ADEA amendments, agreed:

> Section 4(f)(2) was intended to permit . . . varying coverage of workers in different age groups to reflect those [cost] differences so long as they are based on valid assumptions. . . .

123 Cong. Rec. 34295 (October 19, 1977); *see also* remarks of Sen. Williams, 124 Cong. Rec. 8219 (March 23, 1978) ("[Javits] statements are consistent with the position taken by the Department of Labor regarding these matters . . . [and] accurately reflect Congressional intent in this regard.")

The statements of managers and other legislators from the House confirmed that section 4(f)(2) authorizes only reductions in benefits necessitated by costs. *E.g.*, remarks of Rep. Hawkins, 124 Cong. Rec. 7881 (March 21, 1978) ("the purpose of Section 4(f)(2) is to encourage the employment of older workers by permitting age-based variations in benefits where the cost of providing benefits to older workers is substantially higher"). Significantly, key supporters in the House made clear that in proscribing mandatory retirement (the practice that had given rise to conflicting decisions in the courts of appeals) they in no way intended to authorize the total denial of benefits based on age. *See* Remarks of Rep. Weiss, 124 Cong. Rec. 7887 (March 21, 1978) ("it is not the intention of this amendment to have older workers cut off from their health and benefit plans the day they reach age 65 . . . [employers] should not interpret the 1977 (sic) amendments to the ADEA as a license to cease to provide reasonably benefits to their older employees"); Remarks of Rep. Waxman, 124 Cong. Rec. 7888 (March 21, 1978) ("In the absence of actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer, such a policy [of age-based terminations of benefits] constitutes discrimination and a conscious effort to evade the purposes of the act"); remarks of Rep. Pepper, 124 Cong. Rec. 7886 (March 21, 1978).

In sum, the wealth of 1978 legislative history clearly expresses congressional approval that proof of equal benefits or equal cost is the exclusive means of escaping liability under section 4(f)(2) of the Act.

D. 1979 executive branch regulations

After the passage of the 1978 amendments, the Department of Labor responded to congressional requests for more comprehensive guidance regarding section 4(f)(2) by issuing an amendment to its Interpretation Bulletin on Employee Benefit Plans, 29 C.F.R. Section 860.120, 44 Fed. Reg. 30648 (May 25, 1979). The amendment, which specifically relied on the extensive legislative history approving the existing rules, continued in effect the "equal benefit or equal cost" principle previously enunciated by the Department and endorsed by Congress. The amendment provided:

> The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations. . . . Where employee benefit plans do meet the criteria in Section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. Since Section 4(f)(2) is an exception from the general non-discrimination provisions of the Act, the burden is on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met.

29 C.F.R. Section 860.120(a)(1) (1979), *recodified* at 29 C.F.R. Section 1625.10(a)(1). In accord with this interpretation, the regulations provide that an employer may demonstrate that a plan provision is "not a subterfuge" and is consistent with the Act's purpose, by showing that "the lower level of benefits is justified by age-related cost considerations." 29 C.F.R. Section 1625.10(d). Thus, the 1979 interpretation continued in effect the "equal benefit or equal cost" principle consistently enunciated by the Executive Branch and previously endorsed by Congress as the exclusive means of proving the Section 4(f)(2) defense.

The regulations also reaffirmed the intent of the original "equal benefit or equal cost" principle by specifying that the only cost relevant to the issue of "subterfuge" was *the cost of the particular challenged benefit.* Under a heading entitled "subterfuge" the regulations stated:

> (1) Cost data—General. Cost data used in justification of a benefit plan which provides lower benefits to older employees on account of age must be valid and reasonable. *This standard is met where an employer has cost data which show the actual cost to it of providing the particular benefit (or benefits) in question over a representative period of years.*

29 C.F.R. Section 860.120(d)(1) (emphasis added). *See also* 44 Fed. Reg. 30653 ("under the benefit-by-benefit approach, as outlined above, *reductions in the level of one benefit* such as group term life

insurance—*must be justified by an increase in the cost of that particular benefit,* regardless of any adjustment in the levels of other benefits.") (emphasis added).

Pursuant to Reorganization Plan No. 1 of 1978, Congress transferred enforcement authority over the ADEA from the Department of Labor to the Equal Employment Opportunity Commission effective July 1, 1979. Reorg. Plan No. 1 of 1978, 3 C.F.R. Section 321, *reprinted in,* 92 Stat. 3781 (1978). The Labor Department regulations interpreting the requirements of section 4(f)(2) were continued in effect unchanged by the EEOC, 44 Fed. Reg. 37974 (June 29, 1979), and were eventually recodified at 29 C.F.R. Section 1625.10, 52 Fed. Reg. 23811. The "equal benefit or equal cost" regulation remained in effect until the Supreme Court's decision in *Betts.*

E. Acceptance of the EEOC regulations by the circuit courts of appeals and key employer representatives

Consistent with both congressional intent and the longstanding administrative regulations, the federal courts of appeals have limited the applicability of section 4(f)(2) to benefit reductions that are justified by age-related cost considerations. Thus, for example, both the Third and Sixth Circuits held that, absent a cost justification, an employer violates the ADEA's proscription on differential benefits by limiting or denying disability benefits to older workers. *See* EEOC v. *City of Mt. Lebanon,* 842 F.2d 1480, 1492 (3d Cir. 1988) (employer must demonstrate age-related cost factors to justify disability benefit reductions); *Betts* v. *Hamilton County Board of Mental Retardation,* 848 F.2d 692, 695 (6th Cir. 1988) (affirming grant of summary judgement when employer failed to show economic justification for denying disability retirement benefits to employees over age 60).

The courts of appeals have applied the same general rule to other employee benefits under the ADEA. Both the Ninth Circuit in *EEOC* v. *Borden's, Inc.,* 724 F.2d 1390 (9th Cir. 1984) and the Third Circuit in *EEOC* v. *Westinghouse Elec. Corp.,* 725 F.2d 211 (3d Cir. 1983), *cert. denied,* 469 U.S. 820 (1984), ruled that because severance pay involves no age-related costs, the ADEA proscribes the denial of severance pay to older workers. And in *Karlen* v. *City Colleges of Chicago,* 837 F.2d 314, 319 (7th Cir.), *cert. denied,* 486 U.S. 1044 (1988), the Seventh Circuit ruled that an employer "had better be able to prove a close correlation between age and cost" in order to justify a substantial reduction in early retirement incentive benefits based on age.

Significantly, the predictability and simplicity of the "equal benefit or equal cost" principle resulted in business support for the rule as well. In 1988, the EEOC issued an Advanced Notice of Proposed Rulemaking regarding employee benefit plans under the ADEA. *See* 53 Fed. Reg. 26,789 (July 15, 1988). The EEOC's announced intention was to review the "equal benefit or equal cost" regulation in light of 1982 and 1986 amendments to the ADEA and the developing case law on employee benefit plans.

In response, the Equal Employment Advisory Council, a national organization representing employers, *urged the EEOC not to rescind or revise* the "equal cost" principle. Specifically, the employer group stated that:

> the [EEOC] would do well to use extreme caution in disturbing policies that are grounded in clear legislative history supporting the [regulation]. *The strong past history of Congressional and agency support for the equal cost principle* is likely to mitigate against any attempt to change the [regulation] under existing law.

Letter to EEOC from Jeffrey Norris, President of Equal Employment Advisory Council, October 12, 1988, *reprinted at Older Workers Benefit Protection Act: Joint Hearing on S. 1511 before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, and the Senate Special Committee on Aging*, 101st Cong., 1st Sess. 366 (1989) (emphasis added). The EEAC added that:

> *The economic basis underlying Section 4(f)(2)—that some benefits are more costly to provide to older workers—is as valid today as when the ADEA was enacted.* Thus, there is no justification for making any substantive changes to the guidance provided by the [regulation] other than in those areas where the ADEA has been specifically amended by Congress. *Id.*, at 365 (emphasis added).

The review of the EEAC was echoed by other employer representatives. During the Senate Hearings on S. 1511, UNUM Corporation, the nation's leading provider of group long-term disability insurance, testified in support of the bill's provisions restoring the "equal benefit or equal cost" principle. Citing its own extensive experience under the EEOC regulation, UNUM's Vice President concluded that: "the age-related cost justification methods . . . have proved to be valid, reasonable and workable." *Id.*, at 336. In response to a subsequent question from Senator Pryor, the chief sponsor of S. 1511, UNUM explained further its support for the EEOC regulation:

> *Question.* Why do you believe that the "equal benefit or equal cost" regulation is the correct test for the 4(f)(2) exception?
>
> Answer. We believe that the "equal benefit or equal cost" regulation is the appropriate test for the Section 4(f)(2) exemption because it is a clear, objective standard. This standard provides a relatively easy and uniform measurement by which employers and insurers can determine nondiscriminatory benefit reductions for older workers. Employers and insurers need a clear standard by which results can be reasonably tested. Without a clear, objective standard we risk increasing litigation and discriminatory employee benefit plans.

Id., at 529. *See also Age Discrimination in Employee Benefit Plans: The Impact of the Betts Decision: Joint Hearing Before the House Select Committee on Aging and the Subcommittees on Employment Opportunities and Labor-Management Relations of the House Committee on Education and Labor.* 101st Cong., 1st Sess. 182–188 (1989) (statement by Ellen Fredel, discussing EEOC regulation as "fair, flexible, and simple" from employer perspective).

F. The Supreme Court's decision in "Betts"

The Supreme Court in *Public Employees Retirement System of Ohio* v. *Betts,* 109 S.Ct. 2854 (1989), held that an employer need not demonstrate a legitimate cost justification in order to deny employee benefits based on age. In doing so, the Court discarded the ADEA's legislative history, rejected the position taken by the Department of Justice and the EEOC in a brief amicus curiae supporting Ms. Betts, and overturned more than twenty years of Executive Branch regulations and judicial precedent.

The case was brought by June Betts, an employee of the Hamilton County Board of Mental Retardation and Developmental Disabilities. At age 61, Ms. Betts became disabled by an Alzheimer's-related disorder and applied for disability retirement. Under the terms of the Public Employees Retirement System of the State of Ohio ("PERS"), employees over the age of 60 at the time of disability were not entitled to disability retirement benefits. Although a younger employee with comparable service and salary would have received $355.00 per month in disability retirement benefits, Ms. Betts had no choice but to rely on a standard age-and-service pension providing $158.50 per month.

In her lawsuit, Betts alleged that the denial of disability retirement benefits to her violated the ADEA. Relying on the EEOC's "equal benefit or equal cost" regulations, the district court and court of appeals held that employee benefit plans qualified for the section 4(f)(2) exception only if any age-related reductions in employee benefits are justified by the increased cost of providing those benefits to older employees. Because the PERS plan provided for reduction in available benefits at age 60, a reduction not shown to be justified by considerations of increased costs, the lower courts concluded that the denial of benefits to Ms. Betts constituted a violation of the ADEA.

The Supreme Court reversed, and in the process overturned several settled principles of law applicable to benefits discrimination claims under the ADEA. First, the Court ruled that the general prohibitions of section 4(a)(1) of the ADEA, 29 U.S.C. 623(a)(1), do not apply to employee benefit plans. The Court instead concluded that "Congress left the employee benefit battle for another day, and legislated only as to hiring and firing, wages and salaries, and other non-fringe benefits, terms and conditions of employment." 109 S. Ct. at 2866. The Court's decision in this regard was inconsistent with virtually all federal courts of appeals to have addressed the issue of benefits discrimination under the ADEA.

Unlike the Supreme Court, those courts of appeals had held that an employee establishes a *per se* violation of section 4(a)(1) of the Act by demonstrating that employee benefits are reduced or eliminated based on age. *See e.g., Karlen* v. *City Colleges of Chicago,* 837 F.2d 314 (7th Cir.), *cert. denied,* 486 U.S. 1044 (1988); *EEOC* v. *City of Mt. Lebanon,* 842 F.2d 1480 (3d Cir. 1988); *Cipriano* v. *Board of Education of North Tonawanda,* 785 F.2d 51 (2d Cir. 1986). Moreover, the Supreme Court's ruling that section 4(a)(1) of the ADEA does not cover discrimination in employee benefits was squarely at odds with the judicial interpretations of the parallel provisions in Title VII of the Civil Rights Act of 1964, from which the substan-

tive prohibitions of the ADEA were taken verbatim. *Compare* 29 U.S.C. 623(a) (1) and (2) (ADEA) *with* 42 U.S.C. 2000e–2(a) (1) and (2) (Title VII). *See generally Arizona Governing Committee* v. *Norris,* 463 U.S. 1073 (1983); *Los Angeles Dept. Of Water & Power* v. *Manhart,* 435 U.S. 702 (1978); *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976).

Second, the Court ruled that in order for an age-based denial of benefits to constitute a "*subterfuge*" under section 4(f)(2), the challenged provision must have been "intended to serve the purpose of discriminating in some non-fringe benefit aspects of the employment relationship." 109 S.Ct. at 2868. In rejecting the validity of the "equal benefit or equal cost" rule, the Court emphasized that "the requirement that employers show a cost-based justification for age-related reductions in benefits appears nowhere in the statute itself." 109 S.Ct. at 2862.

Third, the Court ruled that section 4(f)(2) was not an affirmative defense, and, as a consequence, that plaintiffs in employee benefit cases "bear the burden of showing subterfuge." 109 S.Ct. at 2868. This holding is contrary to the Court's own decision in *Trans World Airlines, Inc.* v. *Thurston,* 469 U.S. 111, 122–124 (1985), and also contrary to the uniform view of the courts of appeals that had addressed the issue. *See e.g., Karlen* v. *City Colleges of Chicago; EEOC* v. *City of Mt. Lebanon; Cipriano* v. *Board of Education of North Tonawanda.* The shift in the burden of proof is especially troubling given the Court's accompanying reliance on a purely subjective "subterfuge" test instead of the objective "equal benefit or equal cost" standard for determining compliance with the Act.

Finally, the Court reaffirmed its holding in *United Airlines, Inc.* v. *McMann,* that an employee benefit plan that predated the ADEA could not constitute a subterfuge to evade the purposes of the Act. In doing so, the Court expressly rejected the statement in the 1978 Conference Report and the floor statements of the managers, which had stressed the ADEA's coverage of all employee benefit plans regardless of their date of origin. The Court relied on its prior analysis in *McMann* because, in the Court's view, Congress had repudiated only the specific result of *McMann* but *not* the underlying reasoning of that decision.

G. Title II—The ADEA waiver provisions

The background and need for legislation requiring minimum standards for the waiver of rights under the ADEA is set forth in detail in the Senate Report on the Age Discrimination in Employment Waiver Protection Act of 1989. Sen. Rep. No. 79, 101st Cong., 1st Sess., 3–17 (1989). As explained below, the substitute waiver provisions included as Title II of this bill differ from the provisions approved by the Committee last year. Nonetheless, the need for such legislation has been fully explained in our earlier report, and—to the extent it is consistent with Title II—we adopt that earlier discussion by reference.

III. History of the Legislation

S. 1511, a bill to amend the Age Discrimination in Employment Act of 1967 to clarify the protections given to older individuals in

regard to employee benefit plans, and for other purposes, was introduced on August 3, 1989 by Senators Pryor, Jeffords, Metzenbaum, Kennedy, Deconcini, and Bumpers. The bill was referred to the Committee on Labor and Human Resources. A joint hearing on S. 1511 was held on September 27, 1989 before the Subcommittee on Labor and the Special Committee on Aging. The legislation was considered at an executive session of the Committee on Labor and Human Resources on February 28, 1990. Senators Metzenbaum and Jeffords proposed an amendment in the nature of a substitute, which became Title I of the bill as reported. Sen. Jeffords offered an amendment to this substitute addressing the issue of ADEA waivers; this amendment became Title II of the bill as reported. The substitute amendment, with the additional Jeffords amendment, was accepted by the Committee on Labor and Human Resources on February 28, 1990.

IV. Hearings

Public hearings were conducted by the Subcommittee on Labor and the Senate Special Committee on Aging in Washington, D.C. on September 27, 1989, to review S. 1511, the Older Workers Benefit Protection Act. The following individuals presented testimony:

Carolyn Betts, Brownstein, Zeidman and Schomer, Washington, D.C.;

Harold A. Sousa, Bristol, Rhode Island;

R. Gaull Silberman, Vice Chairman, Equal Employment Opportunity Commission, Washington, D.C.;

Charles Shanor, General Counsel, Equal Employment Opportunity Commission, Washington, D.C.;

Horace Deets, Executive Director, American Association of Retired Persons, Washington, D.C.;

Fred Rumak, Association of Private Pension and Welfare Plans, Washington, D.C.;

Burton D. Fretz, Executive Director, National Senior Citizens Law Center, Washington, D.C.;

Mark S. Dichter, Morgan, Lewis, Bockius, Philadelphia, Pennsylvania;

Chris Mackaronis, Bell, Boyd and Lloyd, Washington, D.C.;

James D. Short, ERISA Industry Committee, Washington, D.C.;

Kevin McCarthy, Vice President, UNUM Life Insurance Company, Portland, Maine;

Douglas S. McDowell, McGuiness and Williams, Washington, D.C.

V. Committee Views

Title I—Overruling "Betts"

Through this legislation, Congress intends to make unmistakably clear that the ADEA's purpose of eliminating arbitrary age discrimination in employment includes the elimination of age discrimination in all forms of employee benefits. It is little consolation to an older worker to be protected from discriminatory wage payments if an employer is free to discriminate based on age in the

broad range of employee benefits that are included as an individual's compensation, benefits that often are valued between one-quarter and one-third of earned wages.

The decision of the Supreme Court in *Betts* incorrectly sanctioned the creation of a two-tiered system of compensation under the ADEA, one in which older workers inevitably will become targets. The bill is designed to avoid this draconian result by overturning both the reasoning and holding of the Court in *Betts.*

Congressional reaffirmation of the original "equal benefit or equal cost" principle, subject to the exceptions Congress has crafted, will ensure that productive older workers, an ever-growing segment of our labor force, are not discouraged from remaining actively employed. The elimination of mandatory retirement, the requirement of non-discriminatory pension accruals for employees working beyond normal retirement age, and recent changes in the Social Security system are designed to eliminate barriers, monetary and otherwise, to the continued employment of older persons. The changes made by this bill are consistent with those overall changes in national policy.

A. The ADEA's coverage of employee benefits

Section 4(a)(1) of the Act makes it unlawful for an employer: "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age."

The substantive prohibitions of the ADEA were taken *in haec verba* from Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(a)(1), a fact previously noted by the Supreme Court. *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978). *Compare* 29 U.S.C. 623(a)(2) *with* 42 U.S.C. 2000e–2(a)(2). *See generally EEOC* v. *Borden's Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984). As stated in Part II above, the parallel provisions of Title VII consistently have been applied to prohibit discrimination in employee benefits. The Court in *Betts,* however, held that the language of section 4(a)(1) of the ADEA does not apply to employee benefits.

In order to correct the Court's erroneous holding in *Betts,* the bill defines the term "compensation, terms, conditions, or privileges of employment" to encompass all employee benefits, including employee benefits provided pursuant to a bona fide employee benefit plan. Although this change could have been accomplished by adding corrective language directly to section 4(a)(1), the Committee chose to avoid that option so as to reinforce congressional intent that the federal courts continue to interpret the substantive prohibitions of the ADEA like the comparable provisions of Title VII. The distinction made between employee benefits and employee benefit plans is designed to ensure that each discreet benefit (whether provided pursuant to an employee benefit plan or not) is subject to the prohibitions of section 4(a)(1). At the same time, this amendment is not intended to affect the limitations that the courts have placed on the types of employee benefit plans that qualify for protection under section 4(f)(2).

B. The equal benefit or equal cost principle

The Supreme Court in *Betts* rejected the "equal benefit or equal cost" principle and held that section 4(f)(2) provides a broad exemption for employee benefit plans under the ADEA "so long as the plan is not a method of discriminating in other, nonfringe-benefit aspects of the employment relationship . . ." 109 S. Ct. at 2866. In doing so, the Court rejected the wealth of legislative history regarding the limited purposes behind section 4(f)(2), the contemporaneous and longstanding interpretations of the Executive Branch, and the unanimous opinions of the courts of appeals. For all of the reasons set forth in Part II of this Report, the Committee has concluded that the Supreme Court's interpretation is simply incorrect.

The "equal benefit or equal cost" principle provides a sound mechanism for harmonizing two purposes of the ADEA applicable to employee benefit plans: eradicating arbitrary discrimination based on age and promoting the hiring of older persons. Under the rule, employers are not financially penalized for hiring (or retaining) older employees, and older workers are not provided discriminatory benefits based solely on age. Because the Executive Branch regulations, currently codified at 29 C.F.R. 1625.10, have articulated the principle in language understandable to the courts and acceptable to significant segments of the business community, the Committee incorporates the principle in this bill. This principle applies to governmental as well as private employee benefit plans. *See, e.g., EEOC* v. *City of Mt. Lebanon*, 842 F.2d 1480, 1489 (3d Cir. 1988).

In clarifying section 4(f)(2), the Committee has purposefully eliminated the word "subterfuge" from the new section. In so doing, the Committee intends to make clear that under this bill, and subject to the exceptions contained in the bill that are discussed below, the *only* justification for age discrimination in an employee benefit is the increased cost in providing the particular benefit to older individuals. The language of the bill requiring that the "payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker" is designed to provide employers with the flexibility of incurring *greater* costs for benefits on behalf of older workers in appropriate circumstances.

In making these clarifying amendments, it is the specific intent of the Committee to preserve those aspects of 29 C.F.R. Section 1625.10 (1989) that are consistent with congressional intent behind the original section and these amendments. Thus, for instance, because the term "subterfuge" has now been eliminated entirely from section 4(f)(2), discussion of the term "subterfuge" in the EEOC regulation is superfluous except as it is understood to mean the "equal benefit or equal cost" principle.

Also consistent with the regulation, section 4(f)(2) as amended should not be interpreted to apply to plans such as paid vacations and uninsured paid sick leave, "since reductions in these benefits would not be justified by significant cost considerations." 29 C.F.R. Section 1625.10(a)(1).

The only cost to be considered in determining compliance with these amendments is the actual cost of providing the challenged

benefit. 29 C.F.R. Section 1625.10(d)(1). An employer may aggregate costs for an employee benefit in up to five year brackets for the purpose of determining compliance with the "equal cost" prong of the legislation. This process, also known as "age banding," is specifically authorized under the existing regulation and is adopted here. *See* 29 C.F.R. Section 1625.10(d)(3).

With regard to both benefit levels and benefit costs, employers may determine compliance either on a "benefit-by-benefit" basis or on a "benefit package" approach. Under the "benefit-by-benefit" approach, adjustments based on the cost of the benefit must be made "in the amount or level" of the benefit. 29 C.F.R. 1625.10(d)(2)(i). Thus, for example, "higher group term life insurance costs for older workers would justify a corresponding reduction in the amount of group term life insurance coverage for older workers, on the basis of age." *Id.* In other words, if a $100 contribution purchases $50,000 of coverage for an employee age 35 and only $25,000 for an employee age 60, that difference in coverage is lawful under these amendments, as it was under prior law.

Age-based reduction in long-term disability or disability retirement benefits also may be lawful under the benefit-by-benefit approach. *See* 29 C.F.R. 1625.10(f)(1)(ii). Thus, for example, an employer providing long-term disability coverage to all employees may avoid any increases in the cost of providing equal coverage to older employees either by reducing the level of benefits provided to older employees *or* by reducing the duration of benefits available to employees who become disabled at older ages. *Id.* Such differences in coverage, if supported by the necessary cost data, will continue to be lawful under these amendments.

In addition to the benefit-by-benefit approach, an employer may aggregate benefit costs under the "benefit package" approach in determining compliance with these amendments. *See* 29 C.F.R. 1625.10(d)(2)(ii). This approach is generally recognized as providing greater flexibility to employers and has been useful when applied to "cafeteria" style benefit programs, *i.e.,* those in which the employer designates a specified dollar amount which can be used by each eligible employee to purchase the benefits most attractive to each individual. *See* 44 Fed. Reg. at 30,651 (May 25, 1979). The benefit package approach may not be used to reduce or eliminate benefits desirable to older workers, however, such as group health insurance benefits, and may never include pension or retirement benefits. In this regard, the Committee notes with approval (subject to the exception discussed below) the prohibition contained in the existing regulation that makes it unlawful to offset *any* employee benefits with pension or retirement benefits. 29 C.F.R. Section 1625.10(f)(2)(ii).

Finally, in amending section 4(f)(2) it is not the intent of the Committee in any way to alter or modify the requirements of section 4(i) enacted by the Omnibus Budget Reconciliation Act of 1986, 29 U.S.C. section 623(i). That provision, applicable to employees with at least an hour of service in a pension plan year beginning on or after January 1, 1988, requires non-discriminatory accruals or pension credits in defined benefit and defined contribution pension plans. Employees covered by the provisions of section 4(i) must generally have their retirement benefits calculated in a manner

that provides credit for all benefits accrued after the attainment of the normal retirement age specified in the plan. It is not the intent of these amendments to modify those requirements, or otherwise to affect any existing or future cause of action under that provision. In circumstances in which the provisions of section 4(i) are inapplicable, claims of discriminatory accruals or pension credits in defined benefit and defined contribution pension plans shall continue to be resolved under section 4(f)(2) as modified by these amendments.

C. Exceptions to the principle

In codifying the longstanding "equal benefit or equal cost" approach, the Committee recognizes the need to address certain benefit practices which, while arguably in conflict with the "equal benefit or equal cost" principle, either present substantial public policy issues or are otherwise in need of legislative clarification. The new Section 4(l) of the ADEA (added as part of Section 103 of this bill) addresses these issues by creating certain exceptions to the overall prohibitions set forth in sections 4 (a), (b), (c), and (e).

1. Permanent features in defined benefit pension plans

Section 4(l)(1) of the bill creates an exception for certain benefit practices that are permanent features of a defined benefit pension plan. The employer must demonstrate that the plan feature is permanently part of the plan, subject to modification on a prospective basis through the plan amendment process, and provided that such modification is consistent with any other applicable law. The employer also must show that the benefits provided pursuant to this permanent plan feature are continually available to plan participants who meet the relevant eligibility requirements, which may include any contingent event unrelated to age such as a plant closing or layoff.

The Committee intentionally limited section 4(l)(1) exceptions to defined benefit pension plans. Unlike defined contribution pension plans, defined benefit plans customarily take age into account in determining a participant's benefit level. The Committee refers to defined benefit pension plans within the meaning of section 3(35) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. section 1002(35). In limiting the exceptions to these types of pension plans, the Committee wishes to ensure that the benefit practices in issue are subject to the comprehensive range of reporting, disclosure, funding, and fiduciary standards set forth in ERISA, applicable state law, or the Internal Revenue Code. The Committee specifically intends that section 4(l)(1) apply to state and local government pension plans even though such plans are not regulated under ERISA.

With these limitations, the bill provides a safe harbor for three practices in defined benefit pension plans. First, under section 4(l)(1)(A), qualifying plans may continue to establish a minimum age as a condition of eligibility for early or normal retirement benefits. For example, a pension plan may provide that benefits are not payable until an individual reaches the age of 55, 60, or 65. The Committee intends to make clear that this practice, a universally accepted part of pension plan design and a practice lawful under

ERISA, does not violate the ADEA's prohibition against differential benefits based on age.

Second, under section 4(l)(1)(B), a defined benefit pension plan may lawfully provide on a permanent basis for payments that constitute the subsidized portion of an early retirement benefit. Under many plans, benefits are payable at ages earlier than the normal retirement age specified in the plan. Actuarial funding assumptions utilized by defined benefit pensions plans are based on longevity and other factors related to age. Earlier receipt of the benefit justifies an actuarial reduction because the benefits presumably will be paid for a longer period of time. An actuarial reduction of .5% for each month prior to normal retirement is common. Thus, for example, an employee who retires at age 62 in a plan that has a normal retirement age of 65 may experience an 18% reduction in the benefit payable under the plan. Arithmetic reductions that are linked to actuarial determinations also are used by private and public pension plans.

Some defined benefit pension plans, however, forego the imposition of part or all of the permissible actuarial reduction. Thus, for instance, some plans provide for the payment of normal retirement benefits to individuals who satisfy certain age and service requirements, even if those individuals have not yet attained the normal retirement age specified in the plan. The portion of the benefit that could be actuarially reduced, but is not, constitutes the subsidized portion of an early retirement benefit within the meaning of this bill.

Even though such plans provide subsidies only for employees who retire prior to the normal retirement age, the Committee intends to approve these early retirement subsidies.

Third, the new section 4(l)(1)(C) authorizes a defined benefit pension plan to provide on a permanent basis for social security "bridge payments" to plan participants who meet the eligibility criteria. Typically, a social security bridge payment is a fixed monthly payment intended to substitute for social security benefits that will become available to the plan participant either at age 62 (eligibility for reduced Social Security benefits) or age 65 (eligibility for unreduced Social Security benefits).

The Committee concludes that the payment of such supplemental pension benefits by a defined benefit pension plan is lawful under this bill so long as the supplement does not exceed the amount of the Social Security benefits.

The fact that younger retired workers may receive the benefits for a greater number of years and may therefore receive greater total benefits does not make these plans unlawful. *See Dorsch* v. *L.B. Foster Company*, 782 F.2d 1421 (7th Cir. 1986). If a plan provides these benefits, the benefits may not terminate at an age earlier than the first age of eligibility for reduced old-age insurance benefits under Title II of the Social Security Act (42 U.S.C. Section 401 et seq.).

The Committee intends to approve the parallel practice of integrating retiree health benefits with Medicare, which is already permitted under the regulation. *See* 29 C.F.R. 1625.10(e). The availability of Medicare benefits from the federal government will not justify a reduction in employer-provided retiree health benefits if the

result is that, taking the employer-provided and government-provided benefits together, an older retiree is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger retiree. *See id.*

Because the three provisions in section 4(l)(1) are exceptions to the prohibitions of section 4 of the Act, the employer bears the burden of proving these exceptions.

If one of the programs described in section 4(l)(1) is offered on a temporary basis, it may be lawful under section 4(f)(2)(B) if the employer proves that such a program is voluntary and furthers the purposes of the Act. No inference as to the status of such temporary programs under section 4(f)(2)(B) is to be drawn from the existence of section 4(l)(1).

2. Benefit coordination following contingent events

The Committee also intends to create an exception in section 4(l)(2) for certain defined and identified forms of benefit coordination. With the notable exception of health insurance benefits provided under Medicare, 29 C.F.R. 1625.10(e), the regulations under section 4(f)(2) do not permit age-based coordination of benefits. The prohibition was designed to ensure that older employees who are entitled to certain age-related benefits are not penalized by having those earned benefits used as a basis for reducing or denying other non-age-related benefit entitlements. This is particularly important in the area of severance benefits, where the courts of appeals consistently have held that the ADEA prohibits employers from reducing or denying severance pay based on pension eligibility. *See e.g., EEOC* v. *Westinghouse Elec. Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984); *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984). The Committee specifically agrees with and reaffirms a fundamental premise of those holdings: severance pay and pension benefits are not fungible.

Some employers and unions have argued that considerations of basic equity favor coordination of severance and pensions. They contend that (i) at the time of a shutdown or mass layoff, retirement-eligible employees already have an income stream available in the form of a pension; ands (ii) providing severance only (or primarily) to younger employees, who will not have access to their pensions for many years, is the fairest way to maximize immediate benefits for all employees.

On the other hand, the American Association of Retired Persons, other aging advocacy groups, and the EEOC have argued that it is wrong to use pension eligibility as a basis for reducing the *unrelated* benefit of severance. Although both pensions and severance take the form of cash payments, they serve fundamentally different purposes. Severance provides short-term wage replacement to address the acute needs of the dislocated employee who is searching for a new job. Moreover, an employee has no legal right to severance pay outside the scope of a collective bargaining agreement or an employer's contractually-binding personnel policy.

In contrast, pension benefits are deferred income in the form of a long-term income supplement. They are paid for the lifetime of an employee who, upon reaching a certain age, voluntarily decides to discontinue employment with that employer. Moreover, unlike all

other benefits, pension benefits, once vested, are a legal entitlement. Every employee who has vested in his or her pension benefit is entitled to receive that benefit upon reaching normal retirement age—regardless of whether the employee previously received a severance benefit from that employer.

The Committee notes the example of Harry Sousa, a rubber worker from Rhode Island who testified at the Senate hearing. *See Older Workers Benefit Protection Act*, S. Hrg. 101-308, 101st Cong. 1st Sess., 23-33 (1989). At the time of his plant closing, Sousa (age 57) was compelled to accept early retirement and his severance was reduced by the present value of his pension. Sousa would have been entitled to $47,000 (approximately 2 years pay) after 33 years with the company. Instead, once the present value of his pension was deducted, he received less than $14,000. Sousa received $20,000 less in severance than coworkers with fewer years of service but who were not yet eligible for retirement because they were younger than he was. In addition, because he needed money after his significant severance pay reduction, Sousa was effectively forced to take an *early* retirement pension. He thereby received $305 per month instead of the $495 per month he would have received if he could have waited to retire until age 65. His younger co-workers *will* get the larger, "normal" retirement benefit when they reach age 65. Thus, Sousa lost $33,000 from his severance entitlement because he was eligible for an immediate pension; he then received $190 less per month from his pension because he was forced to take this early retirement. Thousands of employees have experienced losses similar to Mr. Sousa's following shutdowns or mass layoffs.

The Committee reaffirms that pension benefits may not be coordinated with severance payments. In this regard, we wish to emphasize two points. First, *pension benefits are age-related.* Pension-eligibility is a proxy for age. Accordingly, it is *per se* age discrimination to use pension-eligibility as a basis for denying an older worker any other benefit. Second, *pension benefits are special under federal law.* Unlike severance (or other benefits), pensions are protected through statutory vesting provisions; they are guaranteed by a federal insurance agency; and they are administered by means of a federal system of reporting, disclosure and fiduciary obligations. Congress, through the Employment Retirement Income Security Act (ERISA) has expressed a commitment to regulate, protect, and underwrite the pension benefits of American workers. It would make little sense for Congress to accord special status to pension eligibility under ERISA and then allow that status to be used under the ADEA as a basis for eliminating other employee benefits. State and local government employees receive comparable pension protection in the areas of vesting, reporting, disclosure, and fiduciary standards as a matter of state law.

Although the bill does not as a general matter permit employers to deny or reduce severance based on pension eligibility, the Committee is sensitive to the concerns raised by employers and unions regarding the need to allocate scarce resources following a shutdown or layoff. Accordingly, section 4(l)(2) authorizes employers who offer retirement health benefits to deduct the value of these health benefits from their obligation to pay severance to retirement-eligible employees. The Committee concludes that there are

at least two reasons for viewing retiree health and pensions differently in this context. Unlike pensions, retiree health benefits are not currently subject to ERISA's vesting, accrual, and insurance provisions. Rather, an individual's right to these health benefits arises from an employer's personnel policies, a collective bargaining agreement or the terms of the retiree health benefit plan itself. In addition, retiree health benefits are benefits targeted to older workers. Permitting the coordination of retiree health and severance may encourage more employers to provide retiree health benefits, which the Committee views as a positive policy objective. The Committee emphasizes that coordination of severance and any age-related benefit is unlawful except as expressly provided in section 4(l)(2).

The requisite qualifying event under paragraph 4(l)(2)(A) is the occurrence of a contingent event unrelated to age, such as a plant closing or layoff, that entitles displaced employees to the receipt of severance payments. When this condition is satisfied, an employer may deduct from the severance payments the value of any retiree health benefits provided to an employee who is eligible for an immediate (*i.e. not* a deferred) pension. For purposes of triggering a possible deduction, it does not matter whether the employee already was eligible for retiree health benefits or became eligible as a result of the contingent event.

If retiree health benefits *are* provided, the employer also may deduct from severance any additional pension benefits made available *solely as a result of the contingent event.* This second deduction may be made only if the new pension benefits make the individual eligible for an immediate pension at an *unreduced* pension level. Thus, for example, if at the time of a plant closing an employee was entitled to 80% of a normal retirement pension and as a result of the shutdown that individual received retiree health benefits and became entitled to an amount equal to 100% of a normal retirement pension, the value of the additional 20% as well as the value of the retiree health may permissibly be offset against severance benefits.

Under many pension plans, individuals receive retiree health benefits following a shutdown or layoff even though they only qualify for an actuarially reduced pension. Paragraph 4(l)(2)(B) provides that in the event the employee's immediate pension benefits are actuarially reduced, the amount of the deduction allowable for retiree health benefits shall be reduced by the same percentage reduction that has been imposed on the pension benefit. Thus, for example, if an individual receiving retiree health benefits receives a pension that is actuarially reduced by 18%, the value of that individual's retiree health benefits (as calculated under this section) shall be reduced by 18% before any deduction is taken.

Paragraph 4(l)(2)(C) permits an employer to include as severance pay one designated portion of supplemental unemployment compensation benefits (SUB benefits). The portion that may be included as severance consists of additional SUB benefits of up to 52 weeks that have the *primary purpose* and *primary effect* of continuing benefits until an individual becomes eligible for an immediate and unreduced pension, and that are discontinued once the individual becomes eligible for such a pension. Some employers use these

additional SUB payments to provide short-term income maintenance for individuals who need a "bridge payment" until they qualify for their full pension. Because such SUB payments are in effect a form of severance, they are classified as severance for offset purposes. No inference is to be drawn as to whether the supplemental unemployment benefits described in paragraph 4(l)(2)(C) are lawful under the ADEA in any context other than that set forth in section 4(l)(2).

Before *any* deduction or offset may be taken against severance, paragraph 4(l)(2)(D) requires that the retiree health benefits satisfy certain minimum standards. These standards are intended to prevent employers from establishing shame retiree health plans in order to reduce the amount of severance pay owed to individuals. For individuals under the age of 65, the benefits must be at least comparable to those provided under the federal government's Medicare program as of the time the benefits become payable as a result of the contingent event. A benefit package that does not provide benefits identical to Medicare would be considered "comparable" so long as the overall package of benefits is generally equivalent. For individuals age 65 and older, the benefits available must be at least comparable to a plan that provides benefits with one-fourth the value of those provided under Medicare. The lower threshold for retiree health benefits offered to individuals age 65 and older reflects the fact that Medicare already provides a package of benefits to these older retirees. In calculating the value of employer-provided benefits for individuals age 65 and older, benefits that duplicate those provided under Medicare must be disregarded.

If the retiree health benefits satisfy these threshold requirements, paragraph 4(l)(2)(E) establishes a value for the benefits, to be determined based on the age of the individual at the time of the shutdown or layoff. This simplified method for valuing retiree health benefits will avoid the need for employers to make costly actuarial evaluations. If the employer's retiree health benefit obligation is of limited duration, the bill permits on offset of $3,000 for each year under the age of 65 that benefits are provided, and an offset of $750 for each year age 65 and over that such benefits are provided. Thus, for example, if an employee age 63 is entitled to benefits for five years following separation, the employer lawfully may offset $8,250 against severance ($3,000 x 2 plus $750 x 3). If the employer's obligation is for the life of the retirees, the value of benefits for retirees under age 65 at the time of the shutdown or mass layoff is set at a flat rate of $48,000, and a flat rate of $24,000 is applied to benefits for retirees age 65 and older.

These figures are to be adjusted annually according to the medical component of the Consumer Price Index. The figures are based on medical costs reported in a recent study by the General Accounting Office, *Employee Benefits: Companies' Retiree Health Liabilities Large, Advance Funding Cost',*, GAO/HRD—89-51 (June 1989), with assumptions added for life expetancy and dependent content. The lifetime figures, discounted for present value, assume age 60 for the under-65 calculation and age 65 for the 65-and-over calculation.

The lower values for post-65 years and for individuals age 65 or older reflect the fact that Medicare coverage commences at age 65, and that the value of the benefits provided under the employer-sponsored retiree health plan are correspondingly reduced at that point in time. If an employer does not provide any retiree health benefits after age 65, then the value of limited duration benefits for years after age 65, and the value of lifetime benefits for an individual age 65 or older, would be zero.

In calculating the value of retiree health benefits, an employer must subtract the percentage value of any premium contributions made by the employee, regardless of whether the contribution is required as a condition of participation. Thus, for example, if an employee under age 65 contributes $100 of the required monthly premium of $400, and is promised benefits for life at the time of separation, the employer may deduct from severance pay $36,000 (75% × $48,000).

Because these retiree health offsets result in the reduction of denial of severance benefits to older employees—an unlawful practice prior to *Betts*—the Committee is especially concerned that any failure to provide the promiised retiree health benefits be dealt with in prompt and effective fashion. Accordingly, paragraph 4(l)(2)(F) provides for actions by aggrieved individuals or the EEOC to enforce specific performance in the event the employer fails to fulfill its retireee health obligations after individuals have separated from service. The Committee intends that the exchange for diminished severance benefits provide older employees the security of either lifetime, or fixed duration, health insurance benefits. This facilitates long-range planning by employees who, in many instances, may not have planned for retirement.

Modification of benefits in such a manner as to increase significantly the cost to participants or beneficiaries for receipt of benefits or to reduce significantly the benefits provided is not permitted by paragraph 4(l)(2)(E). But relatively minor or insignificant increases in cost or reductions in benefits provided shall not constitute a failure to fulfill the obligation described in that paragraph. In determining whether a cost increase (or benefit reduction) is significant, the effects of any cumulative changes on the employees are relevant. Thus, for example, an increase in an employee's monthly premium contribution for dental coverage form $3 to $4 would be insignificant. By contrast, five consecutive changes, each one requiring an additional $5 monthly premium contribution from the employee, would be a significant increase in the cost of the benefits and would not, therefore, fall within the protection of Section 4(l)(2). Although the Committee recognizes the need for flexibility, it is loath to permit employers to "nickel and dime" their way to significant benefit reductions at the employees' expense.

In addition to specific performance, the aggrieved employees would be entitled under this bill to appropriate relief under Section 7 of the ADEA and to any other damages or relief available under state or other federal laws.

D. Early retirement incentive plans

Since the 1978 amendments to the ADEA, there has been a dramatic rise in the number of early retirement incentive programs

used by employers. These programs are designed to encourage individuals voluntarily to depart employment through the provision of additional financial incentives.

Questions have been raised regarding the legal standards for evaluating claims of discrimination under early retirement incentive plans. The amendments establish two principal criteria for determining the legality of early retirement incentive plans under the ADEA. At the Senate hearing, the EEOC testified that these two criteria should be included in the legislation. *See Older Workers' Benefit Proteciton Act,* S. Hrg. 101-308, 101st Cong. 1st Sess., 55, 60 (1989).

First, the amendments prohibit an early retirement incentive plan from requiring or permitting the involuntary retirement of any individual protected by the ADEA. Because early retirement incentive plans, by definition, target older workers, the circumstances surrounding their implementaiton must be carefully analyzed to ensure that they provide older workers with an uncoerced and free choice. Employees eligible for these programs must be given sufficient time to consider their options, particularly in circumstances when no previous retirement couseling has been provided. Eligible employees must be provided complete and accurate information regarding the benefits available under the plan. If subsequent layoffs or terminations are contemplated or discussed, employees should be advised of the criteria by which those decisions will be made. The critical question involving allegations of involuntary retirement is whether, under the circumstances, a reasonable person would have concluded that there was no choice but to accept the offer. *See Paolillo* v. *Dresser Industries, Inc.,* 821 F./ 2d 81, 84 (2d Cir. 1987). Thus, threats of imminent layoffs, intimidation or subtle coercion may, either individually or collectively, "require or permit" involuntary retirement in any particular case. Consistent with the burdens of proof under section 4(f)(2)(B), the employer bears the burden to demonstrate that the employee's participation in the plan is voluntary.

Second, under new paragraph 4(f)(2)(B)(i), an early retirement incentive plan must further the purposes of the ADEA. All three of the ADEA's purposes may be implicated in considering an early retirement incentive plan or any particular feature of such a plan. These purposes are as follows: "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment". 29 U.S.C. 621(b).

Early retirement incentive plans that deny or reduce benefits to older workers while continuing to make them available to younger workers may encourage premature departure from employment by older workers. This not only conflicts with the purpose of eliminating age discrimination in employee benefits; it also frustrates (rather than promotes) the employment of older persons. As the Seventh Circuit commented in *Karlen* v. *City Colleges of Chicago,* 837 F.2d 314, 320 (7th Cir.) *cert. denied,* 486 U.S. 1044 (1988), "[t]o withhold benefits from older persons in order to induce them to retire seems precisely the form of discrimination at which the Age Discrimination in Employment Act is aimed."

Similarly, the purpose of eliminating arbitrary age discrimination in employee benefits is not served by denying or reducing benefits to older workers based on age-related stereotypes. For example, it was unlawful under section 4(f)(2) prior to *Betts,* and would be unlawful under these amendments, to deny early retirement incentives to older workers based on assumptions that they "would be retiring anyway." As the federal district court held in *Cipriano* v. *Board of Education of North Tonawanda,* 700 F. Supp. 1199, 1211 (W.D.N.Y. 1988), "the fact that plaintiffs would eventually retire at some point in their careers is not the type of" justification sufficient to authorize overt discrimination based on age.

On the other hand, it is clear that a wide variety of early retirement incentive plans may help employers and workers meet problems arising from the impact of age on employment, or promote the employment or retention of older workers, while at the same time prohibiting arbitrary age discrimination in employee benefits. Specifically, early retirement incentives that provide a flat dollar amount (*e.g.*, $20,000), service-based benefits (*e.g.*, $1,000 multiplied by the number of years of service), or a percentage of salary all were permissible before the *Betts* decision and would remain lawful under these amendments. Similarly, early retirement incentives that provide flat dollar increases in pension benefits (*e.g.* $200 per month), percentage increases (*e.g.* 20%), or that impute years of service and/or age would continue to remain lawful.

There are, of course early retirement incentive plans that fall somewhere between the examples of lawful and unlawful plans set forth above. Whether such a plan "furthers the purposes of the Act" is to be decided on a case-by-case basis, taking account of all relevant facts and circumstances.

In general, early retirement incentive plans may be considered lawful provided they are truly voluntary, are made available for a reasonable period of time, and do not result in arbitrary age discrimination. Thus, for example, it may be permissible for an employer to establish a time-related "window" program under which employees are offered a special incentive for a limited period of time in order to make retirement a more attractive option. This type of program is often used by employers as a means of voluntary workforce reduction. The Committee recognizes that employees may welcome the opportunity to participate in such programs, and the Committee does not intend to deprive employees of such opportunities or to deny employers the flexibility to offer such programs rather than resorting to involuntary layoffs.

E. Application of ADEA to pre-act employee benefit plans

In *United Air Lines, Inc.* v. *McMann,* 434 U.S. 192 (1977), the Supreme Court held that an employee benefit plan that pre-dated the ADEA could not be a subterfuge to evade the Act or its purposes. As a practical consequence, the Court's holding in *McMann* immunized any discriminatory employee benefit practice (including involuntary retirement) that was instituted prior to the enactment of the ADEA in 1967 and remained unchanged thereafter.

Congress promptly overturned the *McMann* decision in 1978 by adding a clause to section 4(f)(2) banning any involuntary retirement pursuant to a bona fide employee benefit plan. In the Confer-

ence Report, Congress expressed its disagreement with the Court's analysis in *McMann*:

> The conferees specifically disagree with the Supreme Court's *holding and reasoning* in that case. Plan provisions in effect prior to the date of enactment *are not exempt* under Section 4(f)(2) by virtue of the fact they antedate the act or these amendments.

H.R. Conf. Rep. No. 950, 95th Cong. 2d Sess. 8 (emphasis added).

Despite this unequivocal expression of congressional intent, the courts of appeals subsequently disagreed as to whether discriminatory benefit provisions that pre-dated the ADEA were "exempt" under section 4(f)(2). *Compare Betts* v. *Hamilton Board of Mental Retardation*, 848 F.2d 692 (6th Cir. 1988) *with EEOC* v. *Cargill*, 855 F.2d 682 (10th Cir. 1988). The Supreme Court resolved this conflict in *Betts* by reaffirming its decision in *McMann*. The Court held that the Pre-Act distinction established in *McMann* remained valid because the language upon which it was premised—the term "subterfuge" in section 4(f)(2)—was not specifically defined or modified by Congress in 1978.

Once again, the Committee intends to overturn the erroneous interpretation of the Supreme Court in this regard. We do so by removing the term "subterfuge" from the statute, and by adding a new section 4(k) making explicit the applicability of the ADEA to *all* employee benefit plans. Twenty-three years after enactment of the ADEA, the law simply should not permit employers who have been discriminating the longest—those with employee benefit plans that pre-date the Act—to continue to discriminate.

The Committee regrets that the Supreme Court in *Betts* chose not to credit the language of the 1978 Conference Report, language that appeared in the Congressional Record and was overwhelmingly approved by both Houses of Congress. The Committee hopes that in the future, the Supreme Court will take more seriously such expressions of legislative intent, particularly when they are subject to the same review and ratification as the language of the statute.

F. The burden of proof

The Court in *Betts* erroneously held that section 4(f)(2) is *not* an affirmative defense, and, therefore, that the employee bears the burden of proof under the exception for employee benefit plans.

The Committee wishes to make clear, by adding the last sentence to section 4(f), that the employer bears the burden to plead and prove the defenses and exceptions established in that section. The Committee intends that the amendments made by the bill to section 4(f)(2)—as well as the addition of Section 4(l), which establishes certain "safe harbor" defenses for employee benefits independent of section 4(f)(2)—should be interpreted in a manner similar to the way the EEOC and most courts have interpreted the ADEA's other affirmative defense, section 4(f)(1). Accordingly, the language of section 4(f)(1) that is commonly understood to signify an affirmative defense ("It shall not be unlawful . . . *to take any action otherwise prohibited*" by the ADEA (emphasis added)) has been incorporated as part of section 4(f)(2) and also section 4(l).

In this regard, the Committee notes with approval the uniform body of federal court decisions holding that the "bona fide occupational qualification" exception included in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof. *See. e.g. Heiar* v. *Crawford County*, 746 F.2d 1197-98 (7th Cir. 1984), *cert. denied*; 472 U.S. 1027 (1985); *Hoefelman* v. *Conservation Commission*, 718 F.2d 281, 283 (8th Cir. 1983). *Accord* 29 CFR 1625.6 (position of EEOC). The Committe likewise endorses the position of the EEOC that the "reasonable factors other than age" exception included in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof (*See* 29 CFR 1625. 7), and expresses approval for those circuit court decisions that agree with the EEOC regarding the employer's burden of proof on this exception. *See Criswell* v. *Western Airlines*, 709 F.2d 544, 552-553 (9th Cir. 1982), *affirmed on other grounds*, 472 U.S. 400 (1985). *See also Laugeson* v. *Anaconda Co.*, 510 F2d 307, 315 (6th Cir. 1975); *Cova* v. *Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 959-60 (8th Cir. 1978).

Finally, nothing in this addition to section 4(f), or in the bill as a whole, is intended to disturb existing pre-*Betts* law with respect to the standards for liability or remedies applicable to unions that are signatories to collective bargaining agreements containing provisions challenged under the ADEA.

G. The effective date

The bill provides that the ADEA amendments included as part of Title I and described above are effective upon date of enactment. The bill also specifies that these amendments shall apply to all actions or proceedings brought under the Act prior to June 23, 1989, that were pending on that date. In addition, subject to an exception discussed below, the amendments shall apply to all actions or proceedings brought under the Act after June 23, 1989, the date of the decision in *Betts*.

The Committee has concluded that application of these amendments to actions and proceedings pending on June 23, 1989, would not be manifestly unjust. *See Bradley* v. *Richmond School Board*, 416 U.S. 696, 711, 715-716 (1974). The "equal benefit or equal cost" principle enacted through these amendments was first set forth with clarity in regulation promulgated in 1969 shortly after the passage of the Act and has been followed by most employers for 20 years. The principle was repeatedly endorsed by Congress during the 1978 amendments to section 4(f)(2). In 1979, the principle was amplified by regulations issued at the behest of Congress which continued the principle in effect and detailed its manner of application to a variety of specific employee benefits. The "equal benefit or equal cost" principle was properly applied by the courts to a variety of benefits, including but not limited to severance pay, disability benefits, life insurance, sick pay and early retirement incentives. Moreover, the Act's application to pre-ADEA employee benefit plans was expressly endorsed in the Conference Report accompanying the 1978 amendments to the ADEA. And prior to *Betts*, the federal courts were in agreement that the employer bore the burden of proving each and every element of the defense for employee benefit plans.

Given the twenty year history of the "equal benefit or equal cost" principle, there could be no manifest injustice to employers in applying the principle to actions or proceedings pending on the date *Betts* was decided. Indeed, the Committee believes that it would be manifestly unjust to apply the short-lived and novel legal standards set forth in *Betts* to cases decided after *Betts* but before the date of enactment of these amendments. Such cases, brought by the EEOC and private parties, were undoubtedly filed in reliance on the "equal benefit or equal cost" principle and the settled judicial interpretations thereunder. To decide to case that was filed under the precise legal theories that Congress adopts through these amendments simply because the case happened to come to decision in the brief intervening period of time before *Betts* was officially overturned by Congress would be unfair and unjust. In this regard, the Committee notes with approval the reasoning of the Tenth Circuit Court of Appeals, which held that it would "work a grave injustice" to apply the principle of *Betts* to a case that was filed prior to June 23, 1989. *Mitchell* v. *Mobil Oil Corp.* 38 Daily Lab. Rep. [BNA] at D-1, D-3, to D-4 (February 26, 1990).

The bill provides that the amendments made by title I have a delayed implementation date for collectively bargained agreements that meet certain specified criteria. First, the delay provision applies to actions or proceedings only if they were brought after June 23, 1989. Second, the agreement that is the subject of the pending action or proceeding must have been in effect on the date of enactment of these amendments, and must terminate after that date of enactment. If the agreement was entered into by a labor organization as defined in the Fair Labor Standards Act and contains any provision that would otherwise be superceded by this Act, then the amendments made by this Act shall not apply until the termination of such agreement or June 1, 1992, whichever occurs first. This delayed implementation provision should enable employers and unions to renegotiate any questionable provisions of collective bargaining agreements, thereby serving the longstanding federal interest in promoting stable labor-management relations.

TITLE II—ADEA WAIVERS

Title II of the bill provides for the first time by statute that waivers not supervised by the EEOC may be valid and enforceable if they meet certain threshold requirements and are otherwise shown to be knowing and voluntary. This represents a change from the approach taken in the Waiver Protection Act (S. 54) that was reported out of the Committee last year. The change removes the EEOC's chief concern: that the agency lacked the resources or capability to supervise waivers. At the same time, the Committee recognizes that this also is a substantial departure from the requirements of section 16(c) of the Fair Labor Standards Act which were incorporated into the ADEA by section 7(b). As a result, the Committee intends that the requirements of title II be strictly interpreted to protect those individuals covered by the Act.

The unsupervised waiver must be knowing and voluntary. At a minimum, the waiving party must have genuinely intended to release ADEA claims and must have understood that he was accom-

plishing this goal. The individual also must have acted in the absence of fraud, duress, coercion, or mistake of material fact. The Committee expects that courts reviewing the "knowing and voluntary" issue will scrutinize carefully the complete circumstances in which the waiver was executed. The Committee expreses support for the approach taken on this limited issue in *Cirillo* v. *Arco Chemical Co.,* 862 F.2d 448 (3rd Cir. 1988), and disapproves the approach adopted in *Lancaster* v. *Buerkle Buick Honda Co.,* 809 F.2d 539 (8th Cir. 1987), *cert. denied* 107 S.Ct. 3212 (1987).

The bill establishes specified minimum requriements that must be satisfied before a court may proceed to determine factually whether the execution of a waiver was "knowing and voluntary." The committee has included these requirements with the intent of according basic due process protections to employees who are asked to execute waivers.

In the context of ADEA waivers, the Committee recognizes a fundamental distinction between individually tailored separation agreements and employer programs targeted at groups of employees. Individual separation agreements are the result of actual or expected adverse action against an individual employee. The employee understands that action is being taken against him, and he may engage in arms-length negotiation to resolve any differences with the employer.

Group termination and reduction programs stand in stark contrast to the individual separation. During the past decade, in particular, employers faced with the need to reduce workforce size have resorted to standardized programs designed to effectuate quick and wholesale reductions. The trademark of involuntary termination programs is a standardized formula or package of employee benefits that is available to more than one employee. The trademark of voluntary reduction programs is a standardized formula or package of benefits designed to induce employees voluntarily to sever their employment. In both cases, the terms of the programs generally are not subject to negotiation between the parties. In addition, employees affected by these programs have little or no basis to suspect that action is being taken based on their individual characteristics. Indeed, the employer generally advises them that the termination is *not* a function of their individual status. Under these circumstances, the need for adequate information and access to advice before waivers are signed is especially acute.

A. Waivers as part of individual separation agreements

For waivers executed as part of individually tailored separation agreements, the legislation provides certain threshold requirements that must first be met. Some of these are indicia of whether a waiver is knowing and voluntary; all are necessary independent of the "knowing and voluntary" considerations.

The waiver must be part of a written settlement agreement which specifically identifies that rights and claims under the ADEA are being waived. This degree of clarity and specificity increases the chances that individuals will know their rights upon execution of a waiver. The Committee expects that courts will pay close attention to the language used in the agreement, to ensure

that the language is readily understandable to individual employees regardless of their education or business experience.

The settlement agreement may not waive any rights or claims that may arise after the date the agreement is executed. It is a basic principle of fairness that employees should not be permitted to waive rights or claims on a prospective basis. To take one example, a settlement agreement may call for an employee to receive specified monthly benefit payments for the duration of the employee's life. At some time in the future, those payments may be modified or eliminated in a manner inconsistent with the terms of the agreement. Any waiver of rights that precluded an employee from enforcing those terms would be invalid.

The ADEA rights and claims may be waived only in exchange for consideration that exceeds what the individual already was entitled to by contract or law. This concept of valuable consideration is an essential element of the waiver agreement.

The individual also must be advised in writing to consult an attorney prior to executing the agreement. Moreover, a waiver is not valid unless the individual is given a reasonable period of time in which to review and consider the settlement agreement. An employee who is terminated needs time to recover from the shock of losing a job, especially when that job was held for a long period. The employee needs time to learn about the conditions of termination, including any benefits being offered by the employer. Time also is necessary to locate and consult with an attorney if the employee wants to determine what legal rights may exist. In the case of an individual separation agreement, the individual must be given at least 21 days within which to consider the agreement.

Following execution of the agreement, the individual has a period of seven days within which to revoke. The agreement becomes binding and enforceable, assuming it meets all the requirements of the bill and is knowing and voluntary, only after the expiration of the revocation period.

B. Waivers as part of exit incentive and group termination programs

As noted above, group termination and reduction programs raise additional issues and require additional protection for individuals from whom a waiver is sought. Accordingly, the bill imposes additional threshold burdens (*i.e.*, beyond satisfying the requirements applicable to individual terminations) on employers attempting to secure waivers in connection with such programs.

To being with, more time is needed to review options, understand the program, and consult with an attorney before signing away potentially valid legal claims. Given that these programs often involve large numbers of employees, and complex financial arrangements, the Committee has concluded that individuals must be given at least 45 days within which to consider the agreement.

Second, employers must provide detailed, written information—at the start of the 45 day period—describing the group termination program. This includes information regarding the class of individuals covered by the program, the program's eligibility requirements and any applicable time limitations. The employer also must include a listing of the job titles and ages of all those individuals eligible or selected for the program, and similar information for in-

dividuals who are not eligible. Finally employers must notify eligible employees of any adverse action (such as a layoff) the employer knows or should know may occur if the individual declines to participate in the program, along with the approximate date on which such adverse action would occur.

The Committee believes that collectively these informational requirements will permit older workers to make more informed decisions in group termination and exit incentive programs. The principal difficulty encountered by older workers in these circumstances is their inability to determine whether the program gives rise to a valid claim under the ADEA. In many circumstances, an older worker will have no information at all regarding the scope of the program or its eligibility criteria. The informational requirements set forth in the bill are designed to give all eligible employees a better picture of these factors.

In connection with these informational requirements, the bill also takes steps to ensure that employees who wish to consult with counsel in interpreting the program will not be unduly deterred from doing so by financial considerations. Specifically, the bill obligates employers to pay eighty percent of the fees and costs for services provided by the employee's attorney in connection with the waiver request, up to a maximum for any individual of ten hours at the attorney's usual hourly rate. Due to the complexity of these programs, the Committee views the assistance of counsel as a practical necessity in analyzing the programs and determining whether a violation of the Act has occurred. In this regard, the Committee notes that some Committee members previously encouraged the consideration of requirements "to guarantee that an employee will receive legal advice on ADEA rights."

By capping the employer's responsibility at 8 hours for each employee, the Committee believes that the employer's added costs will be minimized. As a practical matter, many employees will not seek the advice of counsel, either because they do not want to expend their 20% share or because they are willing to accept or reject the exit incentive offer on its face. And, of course, employers who do not request waivers as part of their group termination program bear no attorney consultation costs at all.

C. Waivers in settlement of an EEOC charge or court action

The special protections accorded with respect to exit incentive and group termination programs presuppose that affected individuals are not "on guard" to protect their rights. These protections are not necessary where individuals already are engaged in an adversarial dispute arising from the group termination program. Accordingly, the bill provides that the threshold requirements for a waiver connected with the settlement of an EEOC charge or a court action are essentially identical to the requirements for a waiver that is part of an individual separation agreement. The reference to the individual's "representative" in section 7(f)(2) includes any person or organization authorized to represent the individual in connection with such a charge or court action.

D. Waivers as an affirmative defense

All of the criteria discussed above must be met in order for a waiver to be valid. A waiver of rights or a release of claims is generally available as an affirmative defense. The party relying on the defense has the burden of showing its scope and its applicability to the matter at hand. *See, e.g., Brubaker* v. *United States,* 342 F.2d 655, (7th Cir. 1965). The Committee intends that in any dispute over whether the requirements, conditions and circumstances set forth in paragraph 7(f)(1) or 7(f)(2) have been met, the party asserting the validity of the waiver shall have the burden of proving in a court of competent jurisdiction that the waiver process satisfied each of the factors in that paragraph. At the same time, the Committee does not intend that employers be forced to "prove a negative" where no evidence of fraud, duress, or coercion exists. Thus, ordinarily an employer asserting a waiver defense will be obligated to prove, based on all available evidence, that the relevent factors set forth in paraagraph 7(f)(1) or 7(f)(2) have been satisfied. Once that occurs, the employee may produce additional evidence to suggest that the waiver was not "knowing and voluntary." The employer's burden at that point is to prove that, with respect to the issues raised by the employee, the waiver *was* both knowing and voluntary.

E. Right to participate in EEOC proceedings

The legislation provides that a waiver may not interfere with the EEOC's rights and responsibilities to enforce the ADEA, nor may such a waiver be used to interfere with the employee's protected right to file a charge or to participate in an EEOC investigation or proceeding. The Committee intends this provision as a clear statement of support for the principle that the elimination of age discrimination in the workplace is a matter of public as well as private interest. No waiver agreement may be permitted to interfere with the achievement of that goal. This position is consistent with the holding and reasoning of *EEOC* v. *Cosmair, Inc.,* 821 F.2d 1085 (5th Cir. 1987). An employee may validly waive the right to recover in his own lawsuit as well as the right to recover in a suit brought by the Commission on his own behalf.

F. Effective date

Title II provides that the ADEA amendments described above are effective immediately upon date of enactment. The Committee intends that, subject to the exceptions stated below, these amendments shall apply retroactively to any claims pending on the date of enactment, as well as applying prospectively to all waivers that are executed after the enactment date.

This approach is in accord with the general presumption that, absent a Congressional directive or manifest injustice, a change in the law is applicable to pending cases. *Bradley* v. *Richmond School Board,* 416 U.S. 696, 711, 715–716 (1974).

The exceptions concern the specific time periods, detailed information requirements, and attorney assistance mandated under paragraph 7(f)(1), and also the procedure for settling charges and court actions under paragraph 7(f)(2). Because these provisions

impose specific and detailed requirements that were not previously part of the law, the Committee believes it would be manifestly unjust to impose them on a retroactive or even an immediate basis. Accordingly, these requirements apply only to waivers executed more than 60 days after the date of enactment.

The bill permanently nullifies the EEOC rule on waivers, 29 C.F.R. 1627.16(c), a rule that has been suspended by Congress for the past three years. The Committee wishes to emphasize that section 9 of the ADEA may not be used to make legislative policy and should not be so used again in the future. While section 9 grants authority to the EEOC to issue rules and regulations, the validity of any rules promulgated thereunder will be based on their consistency with both the language and purposes of the ADEA.

VI. Votes in Comittee

Votes taken during Committee consideration of the legislation were as follows:

1. The Committee accepted for discussion purposes, an amendment in the nature of a substitute offered by Senators Metzenbaum and Jeffords.

2. The Committee rejected by voice vote an amendment offered by Senator Hatch. The amendment would have allowed employees from whom a waiver is sought to choose between employer payment for up to eight hours of attorney consultation or employer payment of that eight hour consultation fee directly to the employee.

3. The Committeee rejected by voice vote an amendment offered by Senator Hatch. The amendment would have expanded the types of employee claims that are classified under the new section 7(f)(2) of the ADEA.

4. The Committee approved by voice vote an amendment offered by Senator Jeffords to provide that an individual may not waive any right or claim under the Age Discrimination in Employment Act of 1967 unless the waiver is knowing and voluntary, and setting forth certain minimum requirements that must be met before a waiver may be considered knowing and voluntary.

5. The Committee voted to adopt and report S. 1511 as amended, as an amendment in the nature of a complete substitute, by roll call vote, 11–5.

YEAS	NAYS
Mr. Kennedy	Mr. Hatch
Mr. Pell	Mrs. Kassebaum
Mr. Metzenbaum	Mr. Coats
Mr. Matsunaga	Mr. Thurmond
Mr. Dodd	Mr. Cochran
Mr. Simon	
Mr. Harkin	
Mr. Adams	
Ms. Mikulski	
Mr. Jeffords	
Mr. Durenberger	

VII. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, March 26, 1990.

Hon. Edward M. Kennedy,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 1511, the Older Workers Benefit Protection Act, as ordered reported by the Committee on Labor and Human Resources on February 28, 1990. We estimate enactment of S. 1511 would not affect the federal budget. The budgets of certain state and local governments could be significantly affected by enactment of this bill, but CBO is not able to estimate the impact.

S. 1511 would amend the Age Discrimination in Employment Act of 1967, hereafter referred to as the Act, to ensure that older workers are not being coerced or manipulated into waiving their rights under the Act upon retirement. Currently, some employers are requiring employees, particularly those accepting early retirement and other exit incentive offers to sign waivers of the right to bring cases of age discrimination against the employer. In addition, S. 1511 would require that virtually all age-based reductions in employee benefit plans be justified by significant cost considerations. Recently, the Supreme Court ruled in Public Employees Retirement System of Ohio vs Betts, 109 S. Ct. 256 (1989) that such age-based reductions need not be justified in that way.

This bill potentially could affect the disability retirement systems in ten states. After discussions with retirement system representatives in several of these states, however, CBO staff found some uncertainty as to what actions would be required under this bill. There are many options with a wide range of costs available to these states under this bill. Some states may be able to lower selected disability retirement benefits; however, because many states are under contractual agreements assuring that benefits will not be reduced, such states have indicated that they are likely to increase them.

CBO is unable to estimate the costs of the bill for either state or local governments, because we are unable to evaluate all existing state and local employee benefit plans and determine what they would do to be in compliance with S. 1511. In our survey of affected states, however, we did find that officials of both Ohio and New York prepared cost estimates of providing equal benefits to all participants. Staff of the state of Ohio have estimated that it would cost Ohio $40 million annually to comply and New York state officials have estimated that it would cost the state $8 million annually to comply. CBO is unable to make an evaluation of these cost estimates, because we do not have the supporting detail.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Cory Leach (226-2820).

Sincerely,

James L. Blum,
Acting Director.

VIII. Regulatory Impact Statement

In accordance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 1511 is made:

A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

S. 1511 would amend the Age Discrimination in Employment Act of 1967 (ADEA), as amended, and as such, would apply to all employees and employers currently covered by that law. Employers with fewer than twenty employees are exempt from the requirements of the ADEA, and, therefore, would be exempt from the requirements of S. 1511. Employees who are at least 40 years of age are protected by the provisions of the ADEA. The U.S. Bureau of Labor Statistics (BLS) estimates that in 1988, approximately 46 million workers forty years of age and older were employed in the civilian workforce and the Armed Forces.

B. ECONOMIC IMPACT ON THE INDIVIDUALS, CONSUMERS, AND BUSINESSES AFFECTED

The Committee is unable to determine the precise economic impact the legislation would have on affected individuals, consumers, and businesses, but the Committee believes that any such impact will be relatively minor.

C. IMPACT OF THE ACT ON PERSONAL PRIVACY

The Committee is unaware of any personal privacy implications that would result from enactment of S. 1511. The legislation does regulate the use of private waiver "agreements" that some employees have been required to sign as a condition of receiving certain employment benefits. This does not mean that the legislation intrudes into personal privacy; rather, the legislation offers legal protections to those employees who otherwise might have been quietly and unknowingly manipulated or coerced into waiving their statutory rights.

D. ADDITIONAL PAPERWORK, TIME, AND COSTS

S. 1511 is not likely to result in additional paperwork, time, or costs. In this regard, it is important to note that the Congressional Budget Office estimates that the legislation will have no effect on the federal budget.

IX. Section-by-Section Analysis

TITLE

Section 1 establishes the short title of the Act as the Older Workers Benefit Protection Act.

TITLE I—OLDER WORKERS BENEFIT PROTECTION

Finding

Section 101 establishes that, as a result of the Supreme Court decision in *Public Employees Retirement System of Ohio* v. *Betts*, 109 S.Ct. 2854 (1989), legislation is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967, which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations.

Definition

Section 102 amends section 11 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 630) by adding at the end a new subsection (1), which provides that "the term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan."

Lawful Employment Practices

Section 103 amends section 4 of the Age Discrimination in Employment Act of 1967 in a number of respects.

Paragraph (1) of section 103 strikes the existing subsection 4(f) and inserts a new subsection 4(f) which provides as follows:

Section 4(f) states that it is not unlawful for an employer, employment agency, or labor organization to take action prohibited under subsections (a), (b), (c), or (e) under certain specified circumstances;

Section 4(f)(1) establishes one such set of circumstances, where age is a bona fide occupational qualification necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where the employee is placed in a foreign country and compliance with this Act would cause the employer to violate the laws of the country where the workplace is located;

Section 4(f)(2)(A) provides that action otherwise prohibited under the ADEA is not unlawful where the employer observes the terms of a bona fide seniority system not intended to evade the purposes of the Act, except that no such seniority system may require or allow the involuntary retirement of any individual due to the individual's age;

Section 4(f)(2)(B) provides further that otherwise prohibited action is not unlawful where the employer observes the terms of a bona fide employee benefit plan in which the actual payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, except that: (i) it shall not be unlawful to observe the terms of a bona fide voluntary early retirement incentive plan that furthers the purposes of this Act; and (ii) no employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual

and no such employee benefit plan shall coerce the involuntary retirement of any individual due to age.

Section 4(f)(3) provides that it is not unlawful to discharge or otherwise discipline an individual for good cause.

Finally, Section 4(f) provides that an employer, employment agency or labor union acting under paragraphs 4(f)(1) or 4(f)(2) has the burden of proving that such actions are lawful in any civil enforcement proceedings brought under this Act;

Paragraph 2 of Section 103 renumbers the second subsection 4(i) of the ADEA as a new subsection 4(j).

Paragraph 3 of Section 103 amends Section 4 of the ADEA by adding at the end the following new subsections:

Section 4(k) establishes that a seniority system or employee benefit plan shall comply with this Act regardless of the date the plan was adopted.

Section 4(l)(1) states that a defined benefit plan (as described in the Employee Retirement Income Security Act of 1974) shall not violate subsections 4 (a), (b), (c), or (e) solely because the plan provides, on a permanent basis for:

(A) the attainment of a minimum age as a condition for normal or early retirement benefits;

(B) payments that constitute the subsidized portion of an early retirement benefit; or

(C) social security supplements for plan participants that begin before the age and terminate at the age when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

Section 4(l)(2)(A) states that it is not a violation of subsections (a), (b), (c) or (e) because, following a contingent event unrelated to age, the value of certain benefits described in clauses (i) and (ii) are deducted from severance pay made available as a result of the contingent event.

Clause (i) refers to retiree health benefits received by a pension-eligible employee;

Clause (ii) refers to pension benefits that are available in addition to retiree health benefits, that are available due to the contingent event, and that cause the individual to be eligible for no less than an immediate and unreduced pension.

Section 4(l)(2)(B) establishes that for an employee who receives pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction for severance that is available under that subparagraph shall be reduced by the same percentage as the reduction in pension benefits.

Section 4(l)(2)(C) states that for the purposes of this section, severance pay shall include the portion of supplemental unemployment compensation benefits that: (i) constitutes additional benefits of up to 52 weeks; (ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and (iii) is discontinued once the individual is eligible for an immediate and unreduced pension.

Section 4(l)(2)(D) defines the term 'retiree health benefits' as benefits provided pursuant to a group health plan covering retirees which meets the conditions of clauses (i) and (ii).

Clause (i) establishes that the benefits provided for retirees below age 65 must be at least comparable to benefits provided under title XVIII of the Social Security Act.

Clause (ii) establishes that the benefits provided for retirees who are age 65 and above must be at least comparable to benefits that have one-fourth the value of the benefits provided under title XVIII of the Social Security Act.

Section 4(l)(2)(E)(i) states that if it is the employer's obligation to provide retiree health benefits for only a limited time, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

Section 4(l)(2)(E)(ii) states that if it is the employer's obligation to provide retiree health benefits for an unlimited time, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

Section 4(l)(2)(E)(iii) states that the values in clauses (i) and (ii) shall be determined based on the age of the individual as of the date of the contingent event that is unrelated to age. The section states that the values are effective on the date of enactment, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after the date of enactment of the section, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

Section 4(l)(2)(E)(iv) states that if a retiree is required to pay a premium for retiree health benefits, the value is reduced by the percentage the retiree is required to pay.

Section 4(l)(2)(F) states that if an employer implements a deduction pursuant to section 4(l)(2)(A) and fails to fulfill the obligations in section 4(1)(2)(E), an aggrieved individual may bring an action for specific performance of the obligation described in section 4(1)(2)(E).

Effective Date

Section 104(a) states that this Act and the amendments included are effective on the date of enactment.

Section 104(b) states that except as provided in subsection (c), this Act shall apply to (1) all proceedings brought under the Age Discrimination in Employment Act after June 23, 1989; and (2) all proceedings that were brought under the Act prior to June 23, 1989 that were pending on that date.

Section 104(c) states that with respect to any proceeding brought after June 23, 1989 that pertains to a collective bargaining agreement meeting the conditions set forth in paragraph (1), (2), (3) and (4), the Act shall not apply until the termination of such collective bargaining agreement or June 1, 1992, whichever occurs first.

Paragraph (1) refers to a collective bargaining agreement that is in effect as of the date of enactment;

Paragraph (2) refers to a collective bargaining agreement that terminates after the date of enactment;

Paragraph (3) refers to any provision of the above-referenced collective bargaining agreement that was entered into by a labor organization as defined by 29 U.S.C. 206(d)(4); and

Paragraph (4) refers to any collective bargaining agreement that contains any provision superseded by this Act and the amendments made by this Act, but for the operation of this section.

TITLE II—WAIVER OF RIGHTS OR CLAIMS

Section 201 amends Section 7 of the Age Discrimination and Employment Act of 1967 (29 U.S.C. 626) by adding at the end a new subsection, 7(f), which provides as follows:

Section 7(f)(1) states that an individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. The section states that a waiver may not be considered knowing and voluntary unless, at a minimum, the standards established in sections 7(f)(1)(A) through (I) are met.

Section 7(f)(1)(A) establishes that the waiver must be part of a written agreement between the individual and the employer;

Section 7(f)(1)(B) establishes that the waiver must specifically refer to rights or claims arising under this Act;

Section 7(f)(1)(C) establishes that the individual may not waiver rights or claims that may arise after the date the waiver is executed;

Section 7(f)(1)(D) provides that the individual may waiver rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled.

Section 7(f)(1)(E) establishes that the individual must be advised in writing to consult with an attorney prior to executing the agreement;

Section 7(f)(1)(F) establishes that (i) the individual must be given a period of at least 21 days within which to consider the agreement; or (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual must be given a period of at least 45 days within which to consider the agreement.

Section 7(f)(1)(G) establishes that the individual may revoke the agreement within seven days following execution of the agreement, and that the agreement shall not become effective or enforceable until the revocation period has expired.

Section 7(f)(1)(H) provides that if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer, at the commencement of the period specified in subparagraph (F), must provide the detailed information described in clause (i)—(iv) in writing;

Clause (i) provides that the employer must specify any class, unit, or group of employees covered by such program, and any time limits applicable to such program;

Clause (ii) establishes that the employer must state any demotion, termination, or other adverse action that may occur if

the individual declines to participate in the program, and the approximate date when such adverse action may take effect;

Clause (iii) provides that the employer must state the job titles and ages of all individual eligible or selected for the program; and

Clause (iv) states that the employer must specify the job titles and ages of all individuals in the same plant, facility, or organizational unit who are not eligible or selected for the program,

Section 7(f)(1)(I) establishes that if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class or employees, the employer must agree to reimburse the employee for 80 percent of the employee's attorney fees in connection with the waiver request up to an amount equivalent to a maximum for any individual employee of 10 hours at the attorney's usual hourly rate, and the employer must inform the individual of this agreement as part of the advice required under subparagraph (E).

Section 7(f)(2) provides that a waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination prohibited under section 4 or 15 of the ADEA, may not be considered knowing and voluntary unless subparagraphs (A) through (E) of section 7(f)(1) have been met and the individual is given a reasonable period of time within which to consider the settlement agreement.

Section 7(f)(3) states that in any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in paragraph (1) or (2) have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdication that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

Section 7(f)(4) secifies that no waiver agreement may affect the Commission's rights and respsonsibilities to enforce this Act and that no waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

Effective Date

Section 202 (a) states that except as otherwise provided in this section, the amendment made by section 201 shall become effective on the date of enactment of this Act.

Section 202 (b) provides that subparagraphs (F) through (I) of section 7(f)(1), and all of section 7(f)(2), of the Age Discrimination and Employment Act of 1967 (as added by section 201 of this Act) shall apply only to waivers first offered or executed more than 60 days after the date of enactment of this Act.

Section 202(c) states that on the date of the enactment of this Act, the rule on waivers issued by the Equal Employment Opportunity Commission and contained in section 1627.16(c) of title 29, Code of Federal Regulations, shall have no force and effect.

TITLE III—SEVERABILITY

Section 301 states that if any provision of this Act, or an amendment made by this Act, or the applications of such provision to any person or circumstance is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected thereby.

X. Minority Views—S. 1511

At the Senate Labor and Human Resources Committee's markup of February 28, 1990, the Committee took two different bills—S. 1511 and S. 54, made substantial changes in the original version of each bill, and combined them as titles I and II, respectively of what is now a revised S. 1511. We believe these changes were significant enough to warrant addtional hearings and time for public debate prior to committee action.

The original version of each bill represented a departure from current law and would have outlawed or restricted widely used, accepted, and beneficial benefit practices and programs. Unfortunately, changes made to the original bills and reflected in the new version approved by a Committee majority fail to address many of the valid and crucial concerns about the original version raised by actuaries, employers, employee benefit consultants, labor unions, trade associations, state and local government officials, and the Administration.

As currently drafted, this legislation threatens to have far reaching and unforeseen consequences for millions of employees now eligible to receive pensions, early retirement incentives, health, disability, severance, and other types of benefits from their employers. We cannot support either title of S. 1511 because of the detrimental impact they threaten to have on the continuation of desirable and beneficial benefit arrangements available to millions of American working men and women.

The Administration has also raised very serious concerns about major aspects of this bill including (1) retroactivity; (2) integration and coordination of benefits; (3) waiver of rights under the ADEA; (4) the relationship of the ADEA to ERISA; and (5) the effect on state and local government plans. In his letter to Representative Goodling dated March, 27, 1990, Roger Porter, Assistant to the President for Economic and Domestic Policy outlined these concerns in detail. Mr. Porter's letter also stated that it is likely that if the bill were passed without substantial changes to reflect the objections raised in the letter, several of the President's advisors would recommend that he veto the legislation.

TITLE I—S. 1511

If one thing was clear following last fall's hearing on the original version of S. 1511, legislation introduced in response to the Supreme Court's decision in *Public Employees Retirement System of Ohio* v. *Betts,* it was that the issues which that bill addressed were extraordinarily controversial and complex. It was apparent, we believe, to virtually everyone that, unless great care was taken in drafting this legislation, it might, in fact, outlaw various benefit programs that are extremely beneficial to employees. For example,

certain changes in the revised version of this bill purport, at least, to create limited exceptions for early retirement incentive programs and certain subsidized early retirement benefits. That these revisions were necessary confirms that this bill, in its original form, would have otherwise outlawed these desirable and beneficial programs and benefits.

Employers were far from alone in raising strong objections and concerns about the original bill. They were joined by representtives of major labor organizations and numerous state and local officials. For example, Lynn R. Williams, President of the United Steelworkers of America cited examples of numerous negotiated benefit arrangements and practices that would have been outlawed by the original bill, including allowing a dollar for dollar pension offset for severance pay received by employees as a result of a shutdown. According to Mr. Williams, this and other arrangements "involve the targeting of benefits to the distinct problem of particular subgroups in the work force." "[I]f Congress makes it impossible for bargainers to solve discrete problems, some of them will simply go unresolved and collectively bargaining will be correspondingly impaired." ". . . [I]t is simply unfair for an age discrimination law to outlaw one part of a carefully integrated package, when that package as a whole in eminently fair to older workers." (Letter to Senator John Heinz from Lynn R. Williams, Oct. 24, 1989)

Mr. Williams, in a letter to Senator Metzenbaum dated March 6, 1989, has stated that he supports the substitute version of S. 1511 noting that, "(a)lthough it provides less than the full protection we sought, it resolves our most pressing concerns." But that is not the real issue. The real issue is whether the revised *Betts* bill adequately addresses the compelling concerns raised by Mr. Williams and others that legislation in this area (1) not disrupt and restrict long established benefit plans in both union and non-union settings that protect all workers, including older workers, and (2) enable the rational allocation of resources among the greatest number of people.

This revised version, however, is still unacceptable based on this criteria. In our view, this rush to overturn the *Betts* decision will have serious detrimental long-term consequences for all employees, including older workers, because concerns raised with the original bill have not adequately been addressed.

What is most ironic about the urgent call for action to overturn the Supreme Court's 7–2 decision in *Betts* (June 23, 1989) is that it is propelled by a concern that this decision will cause employers to rush out and change their benefit plans to the detriment of older workers. It is clear, however, that any radical altering of long-standing benefit programs will be prompted, not by *Betts,* but by the onerous requirements of this legislation.

One additional irony, of course, is that June Betts herself, the plaintiff in the *Betts* case, last week won her case which had been remanded to the Sixth Circuit by the Supreme Court in its *Betts* decision.

I. BACKGROUND

A. The Age Discrimination in Employment Act of 1967—the State of the Law Prior to the "Betts" Decision.

Section 2 of Title I of S 1511 sets forth a "finding" that legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967. Section 2 further describes the intent of Congress in 1967, when ADEA was passed, and when it was amended in 1978, as being "to prohibit discrimination against older workers in all benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations."

These findings in S. 1511 are simply incorrect as a matter of fact and law. Congress, in considering age discrimination legislation in 1967, proposed a broad exemption for employee benefit plans. It did so because of concerns about the potential adverse impact that Congressional regulation of this enormously complex area would have on employee benefits plans and on the prospects for employment of other workers.

In fact, on the very first day of Senate hearings on age discrimination legislation in 1967, Senator Javits criticized the original bill because it contained no general exception for benefit plans that differentiated in benefits based on age. Senator Javits observed that "the age discrimination law should not be used as the place to fight the pension battle but that we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treatment under pension plans a condition of that employment." *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare,* 90th Congress, 1st Session. 27(1967). In his view, a "fairly broad exemption . . . for bona fide retirement and seniority systems [would] facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." *Id.* at 28.

Senator Smathers, a co-sponsor of the original bill, similarly noted a "deficiency" in the bill. *Senate Hearings,* at 29. Reading the original bill as requiring employers to provide older workers "the same private pension rights and other fringe benefits" that they provide to younger workers (*id.* at 29), he submitted that such a requirement would impose unwarranted costs on employers and actually induce them to discriminate against older workers in the hiring process. *Id.* at 29–30. Thus, he proposed an amendment that would have permitted employers to vary coverage under benefit plans "where such variance is necessary to prevent the employer's being required to pay more for coverage of an employee than would be required to provide like coverage for his other employees." *Id.* at 30.

Faced with these criticisms, Secretary Wirtz defended the original bill by emphasizing that its "prohibition is of 'discrimination' in the sense of 'arbitrary age discrimination'"—a prohibition which he believed that the "obviously broad" terms of S*4(f) reflected. *Senate Hearings,* at 39 (emphasis in original). He further stated that Section 4(a)'s prohibition on age discrimination "relfect simply

the significant fact that what we are doing here is to extend to individuals in situations not covered by collective bargaining agreements or established retirement policies, a degree of protection against discrimination on the basis of age. . . ." *Id.* at 43. While he noted that "[w]hether different eligibility requirements or benefit levels for older workers would constitute arbitary age discrimination . . . would require determination under the facts of each case" (*id.* at 47), he later added that "the effect of the provision in section 4(f)(2) . . . is to protect the application of almost all plans which I know anything about." *Id.* at 53.

Secretary Wirtz's assurances, however, apparently failed to satisfy Senator Javits, who on the Senate floor the following day, proposed to replace Section 4(f)(2) of the original bill with an amendment making it lawful for an employer:

> to observe a seniority system or any retirement, pension, employee benefit, or insurance plan, which is not merely a subterfuge to evade the purposes of this Act, except that no such retirement, pension, emplcyee benefit, or insurance plan shall excuse the failure to hire any individual[.]

113 Cong. Rec. 7077 (March 16, 1967), reprinted in *EEOC Legislative History,* at 72. He did so because, in his view, "the age discrimination law is not the proper place to fight this particular battle." 113 Cong. Rec. 7076 (March 16, 1967), *reprinted in EEOC Legislative History,* at 71. He also noted, in this regard, that he had "recently introduced a comprehensive bill to deal with this problem" *Id.*

The hearings in the House evidence a clear understanding of the Senate subcommittee's deliberations. *See Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcommittee on Labor of the House Committee on Education and Labor,* 90th Cong., 1st Sess. (August 1,2,3,15,16 and 17, 1967) (*"House Hearings"*).

After the conclusion of these hearings, the House Committee on Education and Labor reported out an age discrimination bill on October 23, 1967. (H.R. 13054). See H.R. Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in EEOC Legislative History,* at 77. This bill included language like that Senator Javits had proposed in the Senate and was essentially identical to that ultimately enacted. *See id.* at 94. In duscussing the amended Section 4(f)(2), the House Committee report stated:

> It is important to note that exception [2] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vita[l] to the legislation, and was favorably received by witnesses at the hearings.

H.R. Rep. No. 805, *supra, reprinted in EEOC Legislative History,* at 77. Twelve days later the same bill was reported favorably to the Senate, with a Senate committee report to the same effect. See S. Rep. No. 723, 90th Cong., 1st Sess. 4 (November 4, 1967), *reprinted*

in EEOC Legislative History, at 108. Congress then passed the bill, and the President signed it into law.

It is therefore simply incorrect that Congress intended Section 4(f)(2) to be limited to the age-related cost justification test when it enacted the Age Discrimination in Employment Act (ADEA) in 1967. The legislative history and the plain words of the statute support a conclusion which differs significantly from the "finding" in Section 2 of this bill. Congress in 1967 clearly postponed the comprehensive regulation of employee benefits for another day. And that day came less than a decade later when it passed ERISA. Similarly, the 1978 amendment to the ADEA only prohibited involuntary retirement; no other changes were made to Section 4(f)(2).

Further, the administrative interpretation of section 4(f)(2) has not consistently limited the exemption to variances based on age-related costs. In fact, while the first interpretation dealing with Section 4(f)(2) published by the Department of Labor (DOL) in 1969 did offer a "safe-harbor" to any employer who could show that an age-based variance had a cost justification, this interpretation did not limit Section 4(f)(2) to such variances.

Indeed, it was not until 1979, twelve years after enactment of the ADEA, that an interpretive bulletin promulgated by the Department of Labor stated for the first time that it would attempt to characterize as a "subterfuge" any benefit variance without an age-related cost justification. When responsibility for enforcing the ADEA was subsequently transferred to the Equal Employment Opportunity Commission (EEOC), it adopted this interpretive bulletin. The bulletin remained, however, an interpretation, not a regulation with the force and effect of law.

Even for purposes of its litigation position, however, the EEOC has not consistently applied the cost justification theory set force in the 1979 bulletin. Specifically, at least with respect to voluntary early retirement plans and their protection under Section 4(f)(2), the EEOC has taken the position in litigation that the cost justification theory contained in the bulletin does *not* apply. See Memoranda of Law for the Equal Employment Opportunity Commission, as Amicus Curiae," filed in *Cipriano* v. *Board of Education.,* No. 84-CV-80 c (W.D.N.Y) at 31-33. Moreover, in his argument on behalf of the EEOC in the *Betts* case, the Solicitor General concluded that Section 4(f)(2) is not "absolutely limited to cost-based justifications" and, indeed, that Section 4(f)(2) "allows employers to bar older employees from participating in employee benefit plans altogether . . .".

It was not until many years after the enactment of the ADEA, that the courts began to deal with this issue. Since that time there has been little agreement among the district courts and the circuit courts as to what standards and tests govern the application of Section 4(f)(2) of the ADEA. For example, while a few decisions endorsed the 1979 bulletin, others expressly repudiated it. *See e.g., Alford* v. *City of Lubbock,* 664 F. 2d 1263 (5th Cir.), *cert. denied,* 456 U.S. 975 (1982); *Brennan* v. *Taft Broadcasting Co.,* 500 F. 2d 212 (5th Cir. 1974); *Germann* v. *Levy,* 553 F. Supp. 700 (N.D. Ill. 1982). Likewise, while a few decisions rejected the concept of integrating benefits (such as severance and pensions), others approved it. *See e.g., Britt* v. *E.I. Dupont,* 768 F. 2d 593 (4th Cir. 1985); *Parker* v.

FNMA, 741 F. 2d 975 (7th Cir. 1984); *EEOC* v. *Airline Pilots*, 661 F 2d 90 (8th Cir. 1981); *EEOC* v. *Firestone Tire and Rubber Co.*, 650 F. Supp. 1561 (W.D. Tenn. 1987); *Abenante* v. *Fulflex*, ____ F. Supp. ____ (1989), *aff'd*, ____ F. 2d ____ (19 ____).

The Supreme Court's 1989 decision in the *Betts* case resolved the differences that had arisen among the lower courts as a result of the EEOC's Interpretive Bulletin. In that case, seven members of the Court held that the EEOC's interpretive bulletin was supported by neither the text or the legislative history of the ADEA.

Based on the foregoing, it is abundantly clear that the cost justification test referred to in Section 2 of this bill would *not* restore the "original congressional intent" in passing the ADEA. Thus, this "finding" ought not to serve as a basis for either the codification of the test or its retroactive application.

Finally, the Committee Report refers to business support for the proposition that the "equal benefit or equal cost" principle should be a mandatory requirement for the use of age factors in all employee benefit plans. However, any inference of widespead business support for the EEOC rule fails to recognize that all of the several employer-oriented amicus curiae briefs in *Betts* vigorously argued that age-based variances in employee benefit plans need not be justified by age-related cost factors in order to qualify for the exemption provided in section 4(f)(2) of the ADEA. See e.g., briefs of the Association of Private Pension and Welfare Plans, the Equal Empioyment Advisory Council, and the National Public Employers Labor Relations Associations.

In fact, in a letter submitted for the hearing record on this bill, the Equal Employment Advisory Council (EEAC) explains in detail the context in which its comments, cited in the Committee Report, were provided. This letter rebuts the suggestion that those comments can be construed as endorsing the "equal cost" principle as a requirement universally applicable to employee benefit plans. Indeed, the EEAC took positions as amicus curiae arguing in *favor* of the integration of retirement and severance pay, and urging that while the "equal cost" defense is a safe harbor, it is not the exclusive means of establishing a defense under section 4(f)(2).

More to the point, however, are industry comments filed on the integration issue when that issue was posed directly by the government. In 1978, the Department of Labor initially proposed that benefits could be applied *only* on a benefit-by-benefit basis. See 43 Fed. Reg. 43264, 43265, September 22, 1978. Comments from industry, including the EEAC, strongly opposed this proposal. Indeed, the EEAC's comments urged the adoption of a benefit package approach that would allow the integration of retirement benefits into a package that could include other benefits such as life and health insurance and long-term disability benefits.

B. S. 1511 as introduced

Within six weeks of the Court's decision in the *Betts* case, S. 1511, was introduced. The premise of the bill was that the EEOC's interpretive bulletin represented a consensus view of the law. The bill was therefore fairly straightforward in its approach. It proposed to overturn the *Betts* decision and write the EEOC guidelines into law.

Proponents of S. 1511 argued that the Supreme Courts' decision had upset well-established law. Swift action was called for, presumably to avoid the onset of widespread discrimination against older workers with respect to their benefits.

In this regard, it is noteworthy that, in the nine months since *Betts* was decided, we have seen no evidence of any marked or widespread changes in the type or level of benefits available to older workers as a result of this decision, nor does the Committee Report refer to such evidence. The irony, however, is that it is this legislation, rather than the *Betts* decision, that will undoubtedly restrict and disrupt the type and level of benefits provided to employees.

Strenuous opposition to S. 1511 from numerous fronts not only slowed the rush to passage but resulted in some, albeit insufficient, modifications. The initial characterization of S. 1511 as a straightforward and uncontroversial restoration of pre-*Betts* law turned out to be incorrect. Numerous employer associations and employers raised serious and strenuous objections. Labor organizations also voiced strong concerns. For example, the United Auto Workers (UAW) stated in its September 21, 1989, letter to Senators Metzenbaum and Pryor that S. 1511 would disrupt a number of "socially desirable practices" found in current employee benefit plans. Lynn Williams, president of the United Steelworkers of America, in a letter to Senator Heinz dated October 24, 1989, outlined a host of desirable collectively bargained programs that would be outlawed if S. 1511 were to become law. He also expressed concern about the impact the bill would have on labor-management relations, saying that the legislation could lead to "a chaotic and difficult process of bargaining and litigation."

Numerous state and local officials have also expressed concerns about S. 1511. The Executive Director of Ohio's Public Employee Retirement System wrote that it would "play havoc with plan benefits and fundings". The chief executive of California's State Teacher's Retirement System warned that passage would "have a major negative impact" on the state of California and force the state to either increase spending or cut benefits. Officials from states including Nebraska, Utah, Texas, Colorado, Alabama, Illinois, Kentucky, New York and Idaho raised concerns with S. 1511, as did the National Conference of State Legislatures.

II. THE COMMITTEE'S COMPROMISE

The revised version of S. 1511 is apparently designed to deal, in some manner, with certain of the concerns with the original bill. The UAW and Steelworkers unions support this compromise, although the UAW, in a letter dated February 27, 1990, expressing support for the substitute acknowledged that this substitute "does not go as far as we would have liked."

Our own review of the Committee's compromise discloses a host of problems with the bill. The four principal areas of concern remain those we had with the original version: (1) the extent to which this bill outlaws or restricts early retirement incentive plans; (2) the extent to which this bill outlaws or restricts integration or benefit coordination; (3) the impact of this bill on state and

local government; and (4) the unfair and constitutionally suspect retroactive application of this legislation.

Notably, however, the debate has shifted on most of these issues as a result of revisions contained in the compromise. It appears, for example, that proponents of this legislation are not intent on outlawing, per se, either early retirement incentive programs or the practice of allowing integration of certain benefits. Nor are they intent on uniformly applying this legislation retroactively. Thus, the proponents apparently recognize that these practices and arrangements should not be completely outlawed. The only remaining question, therefore, is how and to what extent they should be restricted.

Serious concerns remain, however, as to (1) whether the so-called exceptions or allowances permitted by this compromise are appropriate and sufficient and (2) whether the differentiations and distinctions made between various groups of employees (union versus non-union) and types of benefits are either rational, justifiable, or workable.

A. Early Retirement

At the joint committee hearing last fall on S. 1511, both the Vice Chairman of the EEOC and its General Counsel criticized S. 1511 because it would inhibit—indeed, possibly prohibit—companies from offering early retirement their incentives to employees as an alternative to involuntary layoffs. In fact, notwithstanding the original equal cost justification standard of its Interpretive Bulletin, the EEOC had previously taken the position in litigation that early retirement incentive plans were lawful if voluntary and if there is a legitimate business reason for structuring the plans with the specific age limitations.

Early retirement incentive plans are extremely popular with older workers. Moreover, they benefit the entire workforce to the extent that sufficient voluntary retirements avoid the need for involuntary layoffs by employers forced by economic considerations to reduce the size of their workforce.

The original version of S. 1511, whether intentionally or inadvertently, would have effectively banned early retirement incentive programs. Sponsors now claim that the compromise will preserve such programs. The compromise seeks to do so by exempting early retirement incentive programs from the cost-justification test if an employer can prove that the program "furthers the purposes of the Act."

Why this vague and difficult standard requiring that every program "further the purposes of the Act" should apply or how an employer can be expected to meet this burden is unclear. What is clear is that, at a minimum, this standard will lead to interminable litigation and conflicting results by the courts. Further, the prospect of protracted and costly litigation may, alternatively, simply make it impractical for employers to continue using early retirement programs as a means of avoiding involuntary layoffs. The net effect may well be that many employers will simply implement involuntary reductions-in-force and forgo offering early retirement incentives.

Indeed, employers may have no practical choice but to do so if courts interpret the early retirement provisions in the manner that the proponents suggest. The Committee Report suggests that (1) the employer has the burden of proving that a retirement decision is voluntary and (2) a retirement decision should be deemed involuntary whenever a reasonable person would have concluded that there was no choice but to accept the offer of retirement benefits made by the employer. Both of these suggestions constitute serious departures from even pre-*Betts* legal standards and, if adopted, would make it impracticable for an employer to offer an early retirement benefit as an alternative to possible involuntary layoffs.

Even pre-*Betts* legal standards differ substantially from the standards suggested in the Report. Under those standards, an employee had the burden of proving that the employer had discriminated against him or her because of age and, accordingly, had the burden of proving that his or her retirement decision was involuntary (since if it was voluntary, the employer could not be said to have discriminated at all). *Accord, Henn* v. *National Geographic Society,* 819 F. 2d 824, 826-828 (7th Cir.), *cert. denied,* 484 U.S. 964 (1987); *but cf. Paolillo* v. *Dresser Industries, Inc.,* ——F. 2d——, *opinion withdrawn,* 821 F. 2d 81 (2d Cir. 1987) (originally holding that the burden of proof on the issue of lawfulness of early retirement plan is on the employer). Moreover, under these standards, a retirement plan may have been held "involuntary" only where the existing conditions (ignoring the offer of early retirement) violate the ADEA. *Henn* v. *National Geographic Society,* 819 F. 2d at 829. *See also, Hebert* v. *Mohawk Rubber Co.,* 872 F. 2d 1104, 1113 (1st Cir. 1989); *Bodnar* v. *Synpol, Inc.,* 843 F. 2d at 193-194. It is only in these circumstances that the choice may properly be characterized as "compelled" and thus "involuntary." *Accord, Henn* v. *National Geographic Society, 819 F. 2d at 826-828.* (See also the amicus curiae brief of the EEOC in *Paolillo* v. *Dresser Industries* urging rehearing in which it stated as follows: "Since, as explained above, the determination whether the retirements were voluntary must be resolved within the context of Section 4(a)(1), it follows inexorably that the plaintiffs bear the ultimate burden of persuasion." (citations omitted) (p. 16, May 8, 1987)).

Departing from these time-tested standards may well simply drive employers away from early retirement programs altogether. Employers will simply not want to bear the expense of proving that the emplyee's retirement decision was not involuntary. Moreover, even if they would otherwise be willing to do so, they clearly will not do so if the test of involuntariness is whether a reasonable person would have felt no choice but to accept the offer, since a reasonable person will almost always reach that conclusion where the offer is so generous that it dictates the choice. *Accord, Henn* v. *National Geographic Society,* 819 F. 2d at 829. Employers will not use early retirement incentives as an alternative to involuntary layoff if, as a consequence, the employees can turn around and sue the employer on the ground that the employer's generosity gave the employee no choice but to retire.

A further concern that Title I raises with respect to early retirement programs is the limited exception in Section 4(l)(1)(A) of the bill. That exception permits the use of "attainment of a minimum

age as a condition of eligibility for normal or early retirement benefits." This exception applies, however, *only* if this age factor is provided for in the plan on a permanent basis. Thus, one-time, temporary, or ad hoc early retirement programs established in response to specific economic situations would apparently not be protected by this exception.

B. Benefit Coordination or Integration

Employers do not have unlimited funds to provide employee benefits. In order to most fairly distribute benefit dollars, many employers, including the federal government, through collectively bargaining arrangements with unions or individually, have adopted integrated benefit packages. One notable example of a long-standing and widely used packaging method is the coordination of pension and severance benefits by offering severance pay only to non-pension-eligible workers or offsetting the value of pension benefits against severance pay. As one witness pointed out at the hearings, "through this coordination of severance and pension benefits, employers are able to target limited funds available for severance benefits to laid-off long-term employees who are unable to tap their pension resources in order to provide for their needs during unanticipated unemployment." (Testimony of Fred Rumack, September 21, 1989). Similarly, the UAW's initial comments on S. 1511, in its September 21, 1989, letter, stated as follows:

> (W)e are also concerned that S. 1511 would prohibit the integration of employee benefit plans, such as severance or supplemental unemployment benefit plans and pension plans. The UAW has negotiated integrated benefit plans with many companies. We believe that this type of approach represents the best method of assuring the continuation of income and health care throughout the lifetime of workers and their families. If these integrated benefit programs are made unlawful, this will simply permit a small group of workers to "double dip" at the expense of all workers and retirees. Accordingly, we believe that S. 1511 should be amended to expressly permit integrated benefit programs."

That the purposes of the ADEA do not preclude integration of benefits is confirmed by the fact that Congress has expressly proscribed the payment of severance benefits to various group or retirement eligible federal employees. These proscriptions were enacted both before and after the ADEA was enacted in 1967. As one witness at the hearing correctly observed, "a finding that the ADEA has always precluded the integration of benefits requires this body to conclude that Congress has repeatedly flouted its own declaration of policy." (Testimony of Mark Dichter, 9/21/89).

The practice of integrating severence and pension benefits has long been encouarged by the law. Congress recognized when it passed ERISA, in 1974, "that many present plans are fully or partly integrated and that elimination of the integration procedures could substantially increase the cost of financing private plans" and result "in slowing down the growth or perhaps even eliminat(ing) private retirement plans." H.R. Rep. No. 807, 93rd

Cong., 2d Session 69 (1974), reprinted in 2 *Legislative History of the Employee Retirement Income Security Act of 1974* 3189 (1976). Congress therefore chose not to "prohibit 'integration,' a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to retired employees." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 514 (1981). In fact, Justice Marshall, writing for a unanimous Court, pointed out in *Alessi* that the virtues of benefit integration are such that ERISA encourages it even where there is not "an identity between the purposes of pension payments and the purposes of other integrated benefits." 451 U.S. at 519.

Proponents of this legislation apparently no longer feel that all forms of benefit integration should be unlawful per se or discriminatory. Unfortunately, however, the proponents go about drawing distinctions between the type of integration that is and is not permissible in ways which we find questionable.

First, the proponents do not allow packaging of non-retirement benefits and retirement benefits. This limitation is inconsistent with ERISA and sound benefit package design. *See Allessi* v. *Raybesto-Manhattan, supra.*

Second, although the bill purports to incorporate the EEOC bulletin to the extent that it allows packaging of non-retirement benefits with each other, the Committee Report appears to be more restrictive, and might therefore make it more difficult for employers to integrate benefits in the manner previously permitted by the EEOC. For example, the Report describes "cafeteria" programs in which the employer designates a dollar amount that the employee can use to choose between a group of benefits the employee finds most attractive. But the Report also states that the benefit package approach "may not be used to reduce or eliminate benefits desireable to older workers, however, such as group health insurance benefits, and may never include pension or retirement benefits."

If the intent of this Report language is to limit a package approach only to situations in which the employee has a choice among benefits, this would appear to represent a cutback from employer options currently permitted under the EEOC's Interpretive Bulletin. For example, the EEOC's Bulletin at 1625.10(f)(2)(iv) states that a benefit reduction must be offset by another benefit available to the same employees. "No employee," it states, "may be deprived because of age of one benefit without an offsetting benefit being made available to them." This interpretation provides at least some leeway to employers, and does not make the validity of the employee benefit package dependent upon whether the individual has the choice of benefits. Thus, at a minimum, further clarification is required to determine whether the existing leeway provided by the EEOC's Bulletin is being cut back by this bill.

Third, after strenuously arguing against any integration of pension and retirement benefits into the benefit package approach, the compromise bill now includes a limited offset for retiree health benefits and some retirement benefits. The professed concern with the need to allocate scarce resources is belied, however, by the limited nature of the offset. Thus, the bill *only* permits an employer to offset health benefits and so-called pension "sweeteners" from severance pay even then, only if a series of tests are met, including

the requirement of retiree health benefits before *any* offset is allowed.

The first problem with this approach is that only a small minority of employers provide retiree health benefits, thereby severely limiting the universe eligible for use of even this limited offset. Further, to have the offset be large enough to be meaningful, the employer would have to provide retiree health benefits on a lifetime basis—an extremely large obligation that many would be unwilling or unable to provide.

The bill also does allow an additional limited offset against severance pay for pension "sweeteners" provided in a layoff situation. But the employer can only offset the additional benefits necessary to give the retiree an immediate and unreduced pension; the value of the unreduced pension payment itself cannot be offset. Employers can *only* take advatnage of this pension offset, moreover, only if the employer also is providing retiree health benefits.

The rationale for the lines drawn in this bill as to what type of integration is lawful or unlawful remains entirely unclear and has no apparent relationship whatsoever to age discrimination or the purposes of the ADEA.

The Committee Report asserts that integration with retiree health benefits is different than integration with pension benefits and that only the former, and not the latter, should be subject to integration with severance benefits. Contrary to this argument, however, ERISA does not create any rights to pension benefits; rights to pension benefits, like rights to retiree health benefits, arise from personnel policies, collective bargaining agreements, and benefit plans. To be sure, ERISA requires that promises to provide pension benefits, unlike promises to provide retiree health benefits, be honored—i.e., it subjects pension benefits, but not retiree health benefits, to vesting rules. But ERISA permits the promise to provide pension benefits to be integrated with the promise to provide severance benefits (just as it allows retiree health benefits to be integrated with severance benefits). *See Vintilla* v. *United States Steel Corp. Plan for Employee Pension Benefits,* 782 F. 2d 1033 (3rd Cir.), aff'g mem., 606 F. Supp. 640 (W.D. Pa. 1985), *cert. denied,* 475 U.S. 1141 (1986); *Spitzer* v. *New York Post Corp.*, 620 F. 2d 19, 20 (2d Cir. 1980). Indeed, as the Supreme Court found in *Alessi,* ERISA permits this integration of pension and other benefits precisely because it will result in a more rational allocation of total benefits and, in the long-run, in higher levels of pension benefits for older workers. *See* 451 U.S. at 514. The rationale for the proponent's willingness to accept this finding with respect to retiree health benefits but not pension benefits remains unclear.

C. Effect on state and local governments

S. 1511 will require many state and local public employer retirement systems to restructure benefit programs, and a large number of public officials have expressed strong concerns about this legislation. It appears that the rigid, age-related cost-justification rules in this bill cannot be met by many state and local benefit plans. Unfortunately, however, the Committee has failed to recognize, let alone analyze, the effect that this bill would have on state and local governments.

We do not know how many plans would have to be changed, what exposure the retroactive provisions in the bill creates for state and local governments, or what types of changes state legislatives will have to make to bring their plans into compliance. Nor do we think anyone knows the answers to these questions. That is precisely the point. These questions surely ought to be of concern to each member of the Senate, and particularly those Senators whose states will be directly affected by this bill.

We do know that officials in states as diverse as California and Alabama, Idaho and Texas have raised concerns about this bill. The office of the Attorney General of the State of Pennsylvania has identified 37 states whose disability plans alone would be suspect if this bill were to become law.

The impact that this bill would have on state and local governments raises extremely serious questions. The retroactive portions of this bill could expose them to massive amounts of liability. Further, even its prospective application might require a radical and costly restructuring of benefit programs. It is astounding that, in the rush to pass this legislation, these very crucial questions have been either overlooked or ignored.

D. Retroactivity

S. 1511, as originally introduced, was retroactive in two respects. First, it applied to all actions or proceedings brought under the ADEA that were pending on the day the *Betts* case was decided, June 23, 1989, whether or not those cases have since become final. Second, it applied to all actions brought after June 23, 1989.

The first part of the provision is not changed in the compromise. Thus, the constitutional concerns raised by the Justice Department in a letter to Senator Kennedy dated January 25, 1990, remain unaddressed. Also unaddressed is the question of simple fairness and justification for this provision given that no employer could possibly have had the prescience necessary to anticipate and comply with the incredibly complicated provision of this bill, most particularly those provisions dealing with benefit integration. Moreover, the underlying premise of the retroactivity provision—that the law prior to *Betts* was indelibly clear and that all but a few recalcitrant employers were complying with it—is inaccurate. As the letters and statements by employers, unions, and public employers make clear, the law prior to *Betts* was in a state of upheaval and many employers and unions had implemented benefit plans that are inconsistent with the requirements of this bill.

The second part of the retroactivity provision, which applies to all actions brought after June 23, 1989, has been revised to exempt all collective bargaining agreements until their expiration or June 1, 1992, whichever occurs first. While we are reluctant to take issue with any provision which would alleviate the onerous and unreasonable burdens of this legislation, the *selective application* of this bill to non-union employees, both retroactively and prospectively, is both unjustifiable and unfair. For example, let's assume that an employer implemented virtually identical benefit arrangements for its non-union and union employees in a layoff the day after *Betts* was decided, and that the arrangement included the integration of severance and pension benefits, a practice clearly permitted by

that decision. It appears that the employer would, under this bill, be subject to liability, retroactively, to its non-union employees, but not its union employees. Further it would be permitted to continue such arrangements for *just* its union employees in any subsequent layoffs for up to two years.

The distinctions made in the compromise seem irrational and unfair. If the interest to be served here is preventing the disruption of existing plans, then the bill should not be retroactive for any plans, whether non-union or union. Further, at a minimum, state and local plans should also be permitted a period of time in which to bring their plans in compliance.

Further, this limited carve-out for collective bargaining agreements clearly does not resolve the prospective concerns (after 1992 or sooner) raised by unions and others.

E. Other Concerns

This bill raises numerous other concerns and issues which we continue to explore. One such concern is this bill's allocation to the employer the burden of proving the lawfulness of its actions under Section 4(f)(1), and well as Section 4(f)(2) of this bill. Section 4(f)(1), while incorporated in this bill, was not at issue at all and this in no way affected by the *Betts* decision. It includes an exception for age differentiations based on reasonable factors other than age (RFOA).

Once again, contrary to the Section 2 finding that this bill is intended to simply restore the original intent of the ADEA, placing the burden on the employer with respect to cases involving the RFOA exception, according to the Congressional Research Service (CRS), "would change the current judicial interpretations in the majority of circuit courts which have held that the burden of proof remains with the employee in cases in which the RFOA exception is invoked by the employer." (See CRS Legal Analysis of the Burden of Proof Provision in S. 1511, at page 9. October 27, 1989). According to the CRS, the Courts of Appeals for the First, Third, Fifth, Tenth, and Eleventh Circuits have held that the RFOA exception does not constitute an affirmative defense. The ultimate burden of proof, therefore, remains with the employee. Only the Ninth, and possibly the Sixth and Eighth Circuits, according to the CRS, hold that this RFOA exception imposes an affirmative burden of proof on the employer. This bill, however, would place that burden on the employer in all such cases.

III. CONCLUSION

Title I of this bill, though intended to prevent discrimination based on age, would outlaw, restrict, or discourage the use of numerous legitimate plan arrangements, designs and features. We are concerned that, rather than protect older workers, this will result in a lessening of retirement and benefit security for all employees, including older workers.

TITLE II OF S. 1511—WAIVERS UNDER THE ADEA

A second title has also been added to S. 1511 which consists of a series of stringent requirements that must be met by employers seeking waivers or releases of claims under the Age Discrimination

in Employment Act (ADEA). Waiver legislation had previously been voted out of this Committee last year as a separate bill, S. 54. The new waiver language in Title II drops the earlier requirement of S. 54 that certain waivers under the ADEA be supervised by the EEOC or the courts before they are signed. In lieu of supervision, however, significant new requirements have been added.

Title II would, as a practical matter, preclude employees from releasing their rights or claims regarding a particular employment action under the Age Discrimination in Employment Act (ADEA) unless they have filed a charge with the EEOC or a lawsuit. In contrast, current law permits the use of waivers under the ADEA, and under other employment statutes as well, as long as those waivers are "knowing and voluntary". Applying this "knowing and voluntary" standard, courts have assiduously protected employees who are wrongly forced or coerced into signing waivers or releases or are unaware of their legal effects.

The question we ought to ask ourselves about this radical departure from current law is whether it serves the interests of employees and the public to "protect" employees in a mannner that (1) jeopardizes the type of level of benefits offered to them and (2) promotes litigation rather than informal resolution of disputes and potential disputes.

The answer, we believe, is that it does not do so. This is a poorly conceived proposal that would preclude an employee from making a voluntary and informed decision to sign a release in exchange for additional benefits. What it says is that Congress is in a better position than the employee to decide whether he or she should voluntarily sign a release because we can't trust employees to make such decisions for themselves. As a result, options which may be extremely beneficial to employees may be eliminated.

This title may not harm an employee with the resources, time and inclination to pursue a claim through a formal administrative or judicial process. It *will,* however, harm the employee who is unwilling or unable to pursue litigation for any number of reasons, including that it may not be successful. If this title becomes law, that employee will likely lose the option to waive his or her rights in exchange for at least as generous a benefit package as would otherwise be available.

Why is such legislation necessary? Is it because, as some proponents argue, employers use waivers as protection for actions that could not otherwise withstand judicial scrutiny? We think not. We think that in a litigious society such as ours, it is not unreasonable for employers, who are inclined to ease the lawful separation of employees, to seek some assurance that an employee will not accept a generous benefit and then sue the employer the next day. Moreover, is it not in both the public's and the employee's interest to allow parties voluntarily to resolve their disputes short of litigation? Precluding settlements simply because they might insulate a potential wrongdoer from a possible adverse judicial finding would appear largely inconsistent with the generally accepted notion that the voluntary resolution of disputes between parties in the employment context is preferable to litigation.

We believe that it is important to preserve rather than limit the options and choices available to employees. We recognize, however,

that Congress might perform a valuable service to employees by enacting legislation which preserves employee options and choices but at the same time ensures that those choices are truly voluntary and informed. The alternative, offered as a substitute by Senators Hatch and Jeffords to the original version of this bill, S. 54, tried to do precisely that, without limiting the free choice of employees, jeopardizing their potential benefits, or unnecessarily forcing them into litigation. This new provision goes way beyond that alternative.

Comments by the New York State Bar Association's Commercial and Federal Litigation Section in opposition to the original waiver bill, S. 54, apply with equal force and effect to this revised version. That group opposed S. 54 because it found that legislation "unnecessary, unworkable, contrary to the conciliation goals of the Age Discrimination in Employment Act and destined to increase litigation." A co-chair of the Labor and Employment Committee observed the following: "The legislation attacks a non-existent problem and makes mountains out of mole hills—the courts are fully capable under established common law principles of providing safeguards for persons 40 years of age and older, just as they do for everyone else.

I. BACKGROUND

A. What are waivers and when are they used?

Releases or waivers under the ADEA may be used in a number of different contexts. For example, if an employee is discharged for cause, he or she may nonetheless be offered either a sum of money or something else of value in resolution of any and all claims resulting from the discharge. This would in all likelihood include any claim under the ADEA if the employee is over 40 years of age. In this circumstance, the employee is, of course, free to decline the offer and litigate the discharge.

A second situation is one in which companies, faced with the need to downsize their operations, are forced to implement an involuntary reduction-in-force. However, in order to alleviate some of the resultant hardship on affected employees and/or to avoid the substantial cost and burden of potential litigation, the company may offer employees something of value, in addition to what they are otherwise entitled, in exchange for their signing a release of claims resulting from their termination. Again, employees are free to consider this offer and to reject or accept it.

Finally, certain companies forced to downsize may at least initially try to accomplish the requisite workforce reduction by offering employees an early-out incentive program. Employees are typically offered a substantial cash bonus to retire early in exchange for signing a waiver or release agreeing not to sue the company later for age discrimination. The employees, of course, are free to accept the offer or reject it.

For any number of reasons, not all companies require releases, at least in the context of early-out incentive programs. But does that mean, as some have suggested, that employers who seek releases do so because they know they are violating the law? Certainly not. It is not unrealistic, in our view, for a company to at least try to

avoid litigation. Even meritless claims, as we all know, can represent a substantial financial burden. Some companies prefer to apply money otherwise set aside for litigation to the initial level of benefits offered employees. Further, it bears noting that most of the litigation regarding early-out incentive programs is by employees who were not given the opportunity to participate in these programs, rather than by affected employees.

B. Current Law

The prohibitions regarding the use of waivers in Title II represent a radical departure from current law and not a clarification, as supporters of this bill have suggested. Further, the rationale for this legislation appears to ignore safeguards under current law applicable to the execution of waivers.

So long as waivers meet certain criteria, courts have uniformly upheld their use for any number of causes of action under federal and state law including Title VII. Why, one might then legitimately ask, should waivers under the ADEA justify being treated differently?

Supporters of Title II have an answer to that question. One answer they continue to give—notwithstanding that it has been uniformly rejected by the six United States Courts of Appeals which have considered it—is that the ADEA's enactment as part of the Fair Labor Standards Act (FLSA) dictates that FLSA requirements regarding private wage settlements, including their supervision, also apply to ADEA settlements. These courts, and federal district courts as well, have held that employees may release claims under the ADEA without prior or concurrent government supervision.

First, the FLSA authorizes federal supervision but does not require it. Second, two Supreme Court cases decided long before the ADEA was enacted prohibited private settlements of wage and hour claims under the FLSA, but did so on facts different from those likely to arise in cases under the ADEA. *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697 (1945) and *Schulte, Inc.* v. *Gangi,* 328 U.S. 108 (1946). Courts have recognized that there are major differences between the straightforward issues under the FLSA regarding such matters as whether a rate of pay is below the statutory minimum, and the far more complex factual issues which typically underlie ADEA cases. *See, e.g., Runyan* v. *National Cash Register Corp.,* 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied,* 479 U.S. 850 (1986).

Finally, the legislative history of the ADEA reflects bipartisan Congressional support for the informal resolution of ADEA claims and is silent on any prohibitions on private settlements. Sponsors repeatedly emphasized the desirability of informal conciliation and settlements. Senator Williams stated that the ADEA should allow the employee "to resolve the dispute *himself* or work out a compromise with an employer." 123 Cong. Rec. S. 17275 (daily ed. Oct. 19, 1977) (emphasis added). Moreover, Senator Javits stated that an important objective of the ADEA was to avoid the "delays which plague so many of our agencies, such as the EEOC and the NLRB. The EEOC, for example, is already years behind in disposing of its docket. Such delay is always unfortunate, but it is particularly so

in the case of older citizens to whom, by definition, relatively few productive years are left." Age Discrimination in Employment: Hearings on S. 830 and S. 786, Before the Subcommittee on Labor of the Senate Committee on Public Welfare, 90th Cong., 1st Sess. 24–25 (1967).

Proponents of this legislation also appear to ignore the protections available under current law. Courts have repeatedly required that waivers only be upheld if they are "knowing and voluntary." They have carefully scrutinized the release itself and the circumstances surrounding its execution to ensure that employee rights are adequately safeguarded. *See, e.g., Cirillo* v. *Arco Chemical Co.*, 862 F.2d 448 (3d Cir. 1988). For example, it is clear that if an employee is coerced into signing the waiver, the waiver will not meet the requisite criterion that it be voluntary.

II. DESCRIPTION AND IMPACT OF TITLE II OF S. 1511

Under Title II, waivers or releases under the ADEA would not be valid unless (1) they meet a series of costly and stringent requirements described below, or (2) the employee signing the waiver has accused his or her employer of age discrimination by filing a charge with the Equal Employment Opportunity Commission (EEOC) or a lawsuit. Certain of these requirements would apply to ADEA waivers in all circumstances, including individual discharges for cause. All of the requirements would apply to involuntary group terminations (layoffs), and voluntary early-out exit programs.

Title II includes substantial new disclosure requirements not previously in S. 54. One such requirement is that an employer seeking a waiver in connection with an exit incentive program or other group termination program provide each employee offered the program the job titles and ages of the entire workforce at the facility.

A second, even more troubling requirement, is that an employer tell each employee offered participation in a program of "any demotion, termination, or other adverse action that the employer *either knows or should know may occur* if the individual declines to participate in such program. . . ." (emphasis added). While at first blush this requirement may seem relatively innocuous, it is anything but that. Under current law, most courts are unwilling to find that truly *voluntary* early retirement programs violate the ADEA. In this regard, courts generally conclude that plaintiffs fail to make a prima facie case under the ADEA in this circumstance. By requiring that employers advise employees that they may be terminated at some future time when a voluntary program is first offered, the "voluntariness" of the program may be called into question. Thus, ironically, by simply complying with the requirements of this title, the employer may well risk a subsequent successful challenge to the otherwise "voluntary" plan on the grounds that it was coerced.

Third, Title II would mandate that the employer pay up to eight hours of *legal fees* for each employee ofered participation in an exist incentive program "for services provided in connection with the waiver request" at the attorney's usual hourly rate, whatever that may be. This onerous requirement is quite extraordinary.

Let's just take one example of how it would work and the impact it would have. Assume that an employer is forced to downsize by 500 employees and that, in an effort to avoid layoffs, he first offers double that number, or 1,000 employees, a very generous early retirement program. This title would require that the employer pay up to eight hours of attorney's time for each employee offered the program. Thus, assuming a conservative hourly rate of $150, this provision would cost the employer $1.2 million!

Where is this mony likely to come from? Since we start off dealing with an employer that likely has economic problems leading it to downsize in the first place, it seems quite apparent that the $1.2 million will simply come out of the settlements and offers otherwise made to eligible employees. This result is not one that is necessarily to an employee's advantage or even consistent with his or her desires or preferences. Rather, this proposal does not give the employee the choice of whether to keep the money or pay it out to an attorney. The only options available to an employee is to foresake the money and see an attorney, or foresake the money and not see an attorney. It is unclear why Congress would want to substitute its judgement for that of an employee in these circumstances and we are unaware of any applicable precedent for such a radical requirement.

Finally, in one further respect, this revised version of S. 54 is clearly and inexplicably more onerous than its predecessor. The original version of S. 54 did not apply the requirement of supervision to waivers to instances in which the employee had submitted a written alligation of discrimination in good faith to the employer. This exception was consistent with the view of proponents that the need for limitations for waivers arose in "pre-claim" situations, before employees even recognized that they had a problem or what that problem was.

This exception, which no longer appears in the revised version, ironically, was explained in the original Committee report as follows: "The ADEA encourages concilation and informal resolution as a means of achieving voluntary compliance without litigation. The Committee has these objectives in mind when in providing that claims of discrimination need not be formalized in order to be settled without federal supervision or involvement." (Committee Report 101-79, page 19).

Mysteriously, this exception is not incorporated in Title II. We cannot help but wonder what has led proponents of this bill to abandon a provision which was previously touted as fostering conciliation and settlements.

For the reasons set forth alone, it is vital that Congress carefully examine the impact of the restrictions and limitations of this title. There is much at stake here in terms of the type of termination and retirement programs offered to employees and the level of benefits available as part of those programs.

We take little comfort in the theoretical representations by supporters of this bill that it ought not to dissuade employers from continuing to offer what are frequently generous and advantageous termination programs. Statements from major corporations concerning the original waiver bill, S. 54, strongly suggest that it will, in fact, jeopardize the programs and benefits offered based on

sound and legitimate business judgements. For example, Caterpillar Inc., in a May 19, 1989, letter to this Committee, stated that "the extent to which companies can continue to rely on ADEA waivers will inevitably affect future incentive offerings." The Kraft Corporation, in its March 15, 1989, letter to the Labor Subcommittee, stated that "companies will surely reduce the severance benefits that they provide to terminated employees" as a result of this proposed legislation. General Mills, Inc., stated, in its March 14, 1989, letter, that, as a result of this legislation, "more conservative approaches to separation payments come to appear to be the only prudent alternative." Finally, IBM, which recently used releases as a condition of participation in an incentive program, stated the following in its March 21, 1989, letter to the Labor Subcommittee: "IBM considers the right to require an enforceable release of all employment-based claims in exchange for the significant consideration given as part of such programs an important one. There is no reason an employer should be expected to make these significant payouts and then have to bear the high costs of litigating ADEA claims with the recipients." It is likely, if not certain, that the onerous requirements of the revised bill will evoke the same or stronger reactions from other employers.

This title is touted by its supporters as a vehicle to protect employees. By making the informal and expeditious resolution of claims and potential claims more unlikely, difficult and complicated, however, who will most likely be harmed? We believe that legislation such as this, which jeopardizes employee benefits, precludes the knowing and voluntary choices of employees, and limits the options available to them, does not serve the interests of employees. Employees do not need this type of protection.

III. AMENDMENTS

Senator Hatch offered two amendments to this title at the Committee's markup. They were rejected by voice vote, but we support them. While the two amendments do not resolve all of the problems in this title, their adoption would have represented an improvement over the title in its current form.

The first amendment dealt with the attorney's fees requirement outlined above. The amendment would have preserved the attorneys' fees provision, but at the same time given employees themselves the choice or option as to whether they would prefer to receive the money that this proposal otherwise channels to attorneys. We firmly believe that employees are quite competent to make this choice, and that to deny them the opportunity to do so would be saying that we in Congress would rather force this money into the hands of attorneys than allow employees to make this decision themselves.

The second amendment would simply introduce the exception found in S. 54 and omitted from Title II back into this legislation. Briefly, the amendment would not apply the onerous requirements of this title to instances in which an employee has communicated a written allegation of age discrimination to the employer. In this respect, it goes no farther than the proponents of this measure were willing to go last year. It acknowledges and supports the original

intent to preserve the laudable goals of conciliation and informal resolution of discrimination claims.

IV. CONCLUSION

For the reasons stated above, we oppose this legislation. It unnecessarily interferes with the free choice of employees, jeopardizes the benefits and programs otherwise offered to them, and promotes unwarranted litigation.

The sponsors of this legislation are correct about at least one thing: the individuals most likely to be affected by this bill typically, and unfortunately, have limited options available to them. Where the sponsors err, however, is in their belief that Congress will be acting in the best interest of these individuals by further limiting those options.

ORRIN HATCH.
THAD COCHRAN.
STROM THURMOND.
DAN COATS.
NANCY LANDON KASSEBAUM.

XI. Changes in Existing Law

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

* * * * * * *

§ 623. Prohibition of age discrimination

(a) Employer practices

* * * * * * *

[(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

[It shall not be unlawful for an employer, employment agency, or labor organization—

[(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

[(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

[(3) to discharge or otherwise discipline an individual for good cause.]

(f) It shall not be unlawful for an employer, employment agency, or labor organization to take any action otherwise prohibited under subsections (a), (b), (c), or (e)—

(1) where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2)(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan where, for each benefit or benefit package (as permissible under section 1625.10, title 29, Code of Federal Regulations, as in effect on June 22, 1989), the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, except that—

(i) it shall not be unlawful to observe the terms of a bona fide voluntary early retirement incentive plan that furthers the purposes of this Act; and

(ii) no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a), because of the age of such individual; and

(3) to discharge or otherwise discipline an individual for good cause.

An employer, employment agency, or labor organization acting under paragraphs (1) or (2) shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act.

* * * * * * *

[(i)] *(j)* Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees.

* * * * * * *

(k) A seniority system or employee benefit plan shall comply with this Act regardless of the date of adoption of such system or plan.

(l)(1) In the case of a defined benefit plan (as defined in section 3(35) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(35)), it shall not be a violation of subsection (a), (b), (c), or (e) solely because the plan provides, on a permanent basis, for—

(A) the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits;

(B) payments that constitute the subsidized portion of an early retirement benefit; or

(C) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subjection (a), (b), (c), or (e) solely because following a contingent event unrelated to age—

(i) the value of any retiree health benefits received by an employee eligible for an immediate pension; and

(ii) in any case in which retiree health benefits as described in clause (i) are provided, the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and that make the individual eligible for not less than an immediate and unreduced pension,

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an employee who received immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in seciton 501(c)(17) of the Internal Revenue Code of 1986) that—

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which—

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.); and

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act.

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on the date of enactment of this subsection, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after the date of enactment of this subsection, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph

shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

* * * * * * *

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations.

* * * * * * *

(f)(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of a written agreement between the individual and the employer;

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class or employees, the employer informs the individual in writing, at the commencement of the period specified in subparagraph (F), as to—

(i) any class, unit, or group of employees covered by such program, any eligibility factors for such program, and any time limits applicable to such program;

(ii) any demotion, termination, or other adverse action that the employer either knows or should know may occur if the individual declines to participate in such program, and the approximate date when such adverse action reasonably may be anticipated to take effect;

(iii) the job titles and ages of all individuals eligible or selected for the program; and

(iv) the job titles and ages of all individuals in the same plant, facility, or organizational unit who are not eligible or selected for the program; and

(I) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer agrees to reimburse the employee for 80 percent of the fees and costs for services provided by the employee's attorney in connection with the waiver request up to an amount equivalent to a maximum for any individual employee of 10 hours at the attorney's usual hourly rate, and the employer so informs the individual as part of the advice required under subparagraph (E).

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in paragraph (1) or (2) have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) and (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

* * * * * * *

§ 630. Definitions

For the purposes of this chapter—

(a) * * *

* * * * * * *

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

* * * * * * *

APPENDIX

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE & AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA—UAW
Washington, DC, February 27, 1990.

Hon. HOWARD METZENBAUM,
U.S. Senate, Washington, DC.

DEAR SENATOR METZENBAUM: We understand that the Labor and Human Resources Committee may mark up the proposed Older Workers Benefit Protection Act (S. 1511) this Wednesday. This legislation is intended to overturn the Supreme Court's decision in *Public Employees Retirement System of Ohio v. Betts,* which held that the Age Discrimination in Employment Act does not apply to employee benefit plans.

As you know, although the UAW believes the *Betts* decision should be overturned, we have previously expressed serious reservations about the possible impact of S. 1511 on subsidized early retirement programs and the integration of severance pay with other employee benefit plans. It is our understanding that you will be offering a substitute during the markup on Wednesday which will address these concerns. Specifically, the substitute will contain language recognizing the lawfulness of subsidized early retirement programs and social security supplements. Also, the substitute will expressly permit the integration of severance pay with retiree health insurance benefits and certain types of additional pension benefits which are triggered by plant closings.

The UAW deeply appreciates your efforts in developing this substitute proposal. Although it does not go as far as we would have liked, we believe it represents a responsible compromise between the divergent views of the various interested groups. The UAW therefore supports this substitute, and urges the Labor and Human Resources Committee to approve it.

Your consideration of our views on this important issue will be appreciated. Thank you.

Sincerely,

DICK WARDEN,
Legislative Director.

UNITED STEELWORKERS OF AMERICA,
Washington, DC., March 6, 1990.

Hon. HOWARD METZENBAUM,
U.S. Senate, Washington, DC.

DEAR SENATOR METZENBAUM: I write to convey the support of the United Steelworkers of America for the substitute version of S.1511 (the Older Workers' Benefit Protection Act).

From its beginnings, S.1511 has had the laudable purpose of reversing the decision of the Supreme Court in *Public Employees Retirement System of Ohio v. Betts*. In its original form, however, S.1511 also raised several concerns for the Steelworkers Union, particularly in the way it may have threatened a number of important and legitimate products of collective bargaining; for example, subsidized early retirement, severance pay offset rules, and certain qualification requirements for supplemental unemployment benefits.

Your subcommittee has worked earnestly to address these concerns. As a result of long dialogue between many interested parties, the subcommittee has crafted a substitute version of S.1511. Although it provides less than the full protection we sought, it resolves our most pressing concerns.

We believe the substitute is a useful and constructive resolution of our concerns. We look forward to assisting you in achieving the enactment of revised S.1511.

Sincerely,

JOHN J. SHEEHAN,
Legislative Director.

AMERICAN FEDERATION OF LABOR AND CONGRESS
OF INDUSTRIAL ORGANIZATIONS,
Washington, DC, February 28, 1990.

Hon. HOWARD METZENBAUM,
U.S. Senate, Washington, DC.

DEAR SENATOR METZENBAUM: The purpose of this letter is to state the American Federation of Labor and Congress of Industrial Organizations' support for the substitute for S. 1511 as originally introduced you are offering today in the markup of that bill.

The AFL–CIO's position is that the coverage of the Age Discrimination in Employment Act, as stated in the Supreme Court's *Betts* decision, should be expanded to include benefit payments and that this expansion should be accomplished in a manner that does not invalidate salutary collectively bargaining provisions that provide for early retirement and that integrate severance and pension programs. While the version of S. 1511 you are offering today does not provide the full measure of protection for these programs that we sought, it does reform the present law in a way that takes account of our most important concerns.

Because your substitute furthers the overriding objective of overruling the *Betts* decision in this carefully balanced fashion, it war-

rants and has the AFL–CIO's support. We look forward to working with you for propmpt passage of this important measure.

Very truly yours,

ROBERT MCGLOTTEN,
Director, Department of Legislation.

AMERICAN ASSOCIATION OF RETIRED PERSONS,
Washington, DC, February 28, 1990.

Hon. HOWARD M. METZENBAUM,
Chairman, Subcommittee on Labor, Committee on Labor and Human Resources, U.S. Senate, Washington, DC.

DEAR SENATOR METZENBAUM: The American Association of Retired Persons (AARP) believes that legislation to reverse the Supreme Court's decision in *Public Employees Retirement System of Ohio* v. *Betts* is urgently needed to protect older workers from discrimination in one of the most valuable aspects of employment: employee benefits.

AARP will support the amendment to the Older Workers' Benefit Protection Act (S. 1511) that you will offer when this bill is considered by the Committee on Labor and Human Resources today. Although certain provisions of this amendment cause us concern, AARP believes that, on balance, the amendment merits support.

It is AARP's understanding that this amendment is supported by the AFL–CIO, United Auto Workers and United Steelworkers, and that we will work together for speedy enactment of the legislation. We will oppose all amendments that would weaken the bill.

AARP commends you for your untiring efforts on behalf of older workers. We also want to express our thanks to your staff for their exceptional work on this important bill.

Sincerely,

JOHN ROTHER.

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